Supreme Court, U.S.
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In the

# Supreme Court of the United States

October Term, 1997

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JOHN W. THOMPSON; JENNY THOMPSON; JOSEPH N. KARPEN; LEROY BURLING; GLENN THOMPSON; GARY M. KIEDROWSKI; MICHAEL SHEFF; AND ROBERT L. EDMONDS,

*Petitioners,*

v.

UNITED STATES OF AMERICA; MILLE LACS BAND OF CHIPPEWA INDIANS; ARTHUR GAHBOW; WALTER SUTTON; CARLEEN BENJAMIN; JOSEPH DUNKLEY; ST. CROIX CHIPPEWA INDIANS OF WISCONSIN; LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWAS; BAD RIVER BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN; SOKAOGAN CHIPPEWA COMMUNITY, MOLE LAKE BAND, WISCONSIN; RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA; FOND DU LAC BAND OF CHIPPEWA INDIANS; ROBERT PEACOCK; PETER DEFOE; CLIFTON RABIDEAUX; HERMAN WISE; GEORGE DUPUIS,

*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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This petition addresses whether "[t]he privilege of hunting, fishing, and gathering the wild rice upon the lands, the rivers and the lakes included in the ceded territory, . . . during the pleasure of the President of the United States," contained in an 1837 treaty with the Chippewa, 7 Stat. 536, art. V, has been revoked, relinquished, abrogated or terminated by executive actions, subsequent treaties, legislative acts, and judicial decisions, including:

1) Whether the privilege was revoked by executive actions including an 1850 Presidential Order of President Zachary Taylor, which states "the privileges granted temporarily to the Chippewa Indians, by the Fifth Article of the Treaty . . . of July 1837 . . . are hereby revoked."

2) Whether the privilege was relinquished by an 1855 treaty, 10 Stat. 1165, where the Chippewa agreed to "relinquish and convey to the United States any and all right, title, or interest . . . in, and to any other lands in the territory of Minnesota or elsewhere."

3) Whether by virtue of the Nelson Act, 25 Stat. 642 (1889) and the General Allotment Act, 24 Stat. 388 (1887), the Chippewa were subject to state regulation for all off-reservation hunting and fishing activities.

4) Whether the lower courts' characterization of the privilege as an immunity from state regulation rather than a revocable license or other interest "in or to land" is contrary to this Court's holding in Oregon Department of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985).

5) Whether the lower courts' determination that the privilege operates as an immunity from state regulation, unconstitutionally usurps state police powers in conflict with

the principles of federalism embodied in the 10th Amendment of the United States Constitution and the equal footing doctrine.

6) Whether the present litigation against the State is barred by the Indian Claims Commission Act, 60 Stat. 1049 (1946), which provided for an exclusive forum, a statute of limitations, and under which a monetary award was granted to the Chippewa for claims under the 1837 Treaty.

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# PARTIES

The caption includes all Respondents, all of whom were plaintiffs at the district court level and appellees at the Eighth Circuit Court of Appeals. The caption does not include two other petitioner groups who were defendants along with these Petitioners at the district court level, and appellants with these Petitioners at the Eighth Circuit Court of Appeals.

The other two petitioner groups include the State of Minnesota and its officials, and a coalition of nine counties located in the geographic area of the 1837 treaty at issue. Specifically, the two additional petitioner groups include:

1. State of Minnesota, Minnesota Department of Natural Resources, and Joseph Alexander, Commissioner of Natural Resources and Arne Carlson, Governor of Minnesota, Rodney Sando, Commissioner of the Minnesota Department of Natural Resources, and Raymond B. Hitchcock, Assistant Commissioner of Operations Minnesota Department of Natural Resources;

2. County of Aitkin, County of Benton, County of Sherburne, County of Crow Wing, County of Isanti, County of Kanabec, County of Mille Lacs, County of Morrison and County of Pine.

## OPINIONS BELOW

The August 26, 1997 panel decision of the Eighth Circuit (App. 1-73)[1] is reported at 124 F.3d 904. Final judgment was entered at the district court by way of a January 29, 1997 Opinion (Mille Lacs IV, App. 74) which is reported at 952 F.Supp. 1362. The four district court opinions relevant to the questions presented by this Petition are:

1. Mille Lacs I (App. 351-418), reported at 853 F.Supp. 1118.

2. Mille Lacs II (App. 212-350), reported at 861 F.Supp. 784.

3. Mille Lacs III (App. 164-211), unreported.

4. Fond du Lac (App. 419-481), unreported.

## JURISDICTION

The Court of Appeals entered its judgment on August 26, 1997 (App. 1). A timely Suggestion for Rehearing En Banc was denied by a 7 to 2 vote on November 17, 1997 (App. 482). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] These Petitioners rely on a **Joint Appendix** entered into with the two other petitioner groups, the State of Minnesota and the nine Counties. References herein to "**App.**" are citations to the Joint Appendix which is being filed in accompaniment to the State's Petition. References herein to "**LA**" refer to the Landowners' Appendix filed at the Eighth Circuit level by these Petitioners. Citations herein to "**SA**" refer to the State's Appendix filed by the State of Minnesota at the Eighth Circuit level.

## CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED

1. U.S. Const. amend. X (App. 483).
2. Treaty of July 29, 1837, 7 Stat. 536, art. V (App. 484-489).
3. Treaty of Feb. 22, 1855, 10 Stat. 1165 (App. 502-514).
4. Treaty of Sept. 30, 1854, 10 Stat. 1109 (App. 490-501).
5. Nelson Act, Jan. 14, 1889, 25 Stat. 642 (App. 535-544).
6. Act of Feb. 26, 1857, 11 Stat. 166 (App. 517-521).
7. Act of May 11, 1858, 11 Stat. 285 (App. 515-516).
8. Act of Dec. 19, 1854, 10 Stat. 598 (App. 532-534).
9. Act of Aug. 13, 1946, 60 Stat. 1049 (App. 550-564).
0. Act of Sept. 30, 1850, 9 Stat. 944 (App. 522-527).
11. Act of Feb. 27, 1851, 9 Stat. 570 (App. 528-531).
12. Exec. Order of Pres. Taylor, Feb. 6, 1850 (App. 565).
13. H.R. Ex. Doc. No. 51-247 (March 4, 1890) (App. 545-547).
14. Minnesota Territorial Resolution of 1849 (App. 566-568).

## STATEMENT OF THE CASE

The district court's jurisdiction was invoked under 28 U.S.C. §§ 1331, 1362, and under 28 U.S.C. § 1343(a)(3), (4).

In July, 1837, near Fort Snelling, Minnesota, Ojibwe[2] Bands gathered to treat with the United States. This was not their first treaty.[3] The 1837 treaty negotiations were attended by at least 1,000 members of the Bands, their leaders, representatives of government, traders, and missionaries. The tribal leaders and the United States officials would meet in council, and then break so the Indians could confer among themselves and their allies. The Bands first offered to lease the lands to the United States[4] but this offer was rejected by Wisconsin Territorial Governor Henry Dodge who countered:

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[2] "Ojibwe" is the traditional name for the "Chippewa." The Department of Interior currently uses the term "Chippewa," as do the Bands in their official name designations.

[3] In 1825 the Ojibwe had entered into the Treaty of Prairie Du Chien, a treaty designed to separate the hunting lands of the Dakota and

> your Great Father, never buys land for a term of years. I will agree on the part of the President that you shall have the free use of the rivers, and the privilege of hunting upon the lands you are to sell to the United States, during his pleasure. If you sell these lands, you must sell them as all the other nations of Indians have done;...

1837 Treaty Journal at 144 (LA. 729). The next day, on July 28, 1837, Governor Dodge stated:

> I will make known to your Great Father, your request to be permitted to make sugar, on the lands; and you will be allowed, during his pleasure, to hunt and fish on them. It will probably be many years, before your Great Father will want all these lands for the use of his white Children.

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Ojibwe to reduce continuing warfare between them by separating them geographically. For nearly 200 years prior, these Bands were in contact with French and British groups.

[4] 1837 Treaty Journal at p. 144 (LA. 729). This 60 year proposed lease, with the United States to renegotiate with the Tribe's children, is evidence of the Ojibwe's knowledge and sophistication in land conveyance.

Id. at 146 (LA. 731). One missionary in attendance later suggested problems if removal was attempted "before five years" (LA. 740).

When revoking the privilege in the 1850 Executive Order, President Taylor referred to the privilege as "temporary" (App. 565). Whether "temporary," "probably many years," until wanted "for the use of" white settlers[5] , "five years," or even the rejected "sixty years" of lease, the passage of 160 years has long ago passed all these measures of duration. There is no evidence or suggestion whatsoever in the 1837 Treaty Journal that the President's authority to revoke the treaty privilege was limited by an Indian "misbehavior" standard or a requirement of Chippewa removal. The privilege is not described as "perpetual" in the 1837 treaty, the specific term used by federal negotiators to describe hunting and fishing rights in an 1820 treaty (7 Stat. 206) with the Chippewa of Sault Ste. Marie.

The district court found that the Indians' understanding of the 1837 treaty was modified by assurances allegedly given to the Wisconsin Bands during the 1842 treaty negotiations. Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F.Supp. 784, 799 (Mille Lacs II) (App. 242).[6]

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[5] Virtually all public domain lands in the 1837 ceded territory in Minnesota have been conveyed out of the public domain by the United States and most public land in the territory, including the Mille Lacs Band trust lands, were once privately owned (LA. 1977-1979).

[6] The fundamental error of finding a "misbehavior" standard for revocation in the 1837 treaty from the 1842 treaty (LA. 8988) originated from United States v. Bouchard, 464 F.Supp. 1316, 1349 (W.D. Wis. 1978) aff'd, 700 F.2d 341, 356 (7th Cir. 1983) (LCO). The 1842 treaty, which is not at issue in this litigation, applies only to upper Michigan and Wisconsin. Nothing from the 1842 treaty modifies the 1837 treaty's terms. The trial court erroneously relied upon the flawed analysis from Bouchard and LCO. Mille Lacs II, 861 F.Supp. at 827 (App. 302).

The idea that the land use privilege would go on forever is undermined by the statements of Chief Flatmouth:

> My Father, if it was my land you was buying, I would, instead of an annuity for only 20 years demand one from you, as long as the ground lasted. You know that without the lands, and the Rivers & Lakes, we could not live. We hunt, and make sugar, & dig roots upon the former, while we fish and obtain Rice, and drink from the latter.

(1837 Treaty Journal, LA. 732). Flatmouth understood that the Chippewas' ability to obtain their living from the lands was temporary.

The Chippewa language was able to convey the 1837 treaty's plain meaning that the privilege lasted "as long as the President allows or as long as the President permits" (LA. 9467-68). The language contained separate word combinations for "forever" and "perpetual" (LA. 9418-9419). While in isolation, "guarantee" might mean "to set firm" (LA. 9437), if the meaning of the "guarantee" in the 1837 treaty was translated in conjunction with "during the pleasure of the President" there would be "probably hundreds" of words available to translate the concept (LA. 9438-9439) such as "promised for a time" or "until the President says" (LA. 9438-9). No record exists of how the 1837 treaty was translated into Ojibwe.

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"Removal" and "misbehavior" arose later from the Mille Lac Band's argument, based on an 1863 treaty, that the Band was entitled to damages resulting from settlement of certain parts of their reservation prior to the 1889 Nelson Act cession. United States v. Chippewa Indians, 229 U.S. 498, 33 S.Ct. 811, 813 (1913).

The first standard of treaty interpretation requires a textual ambiguity before the Indians' understanding, or lack of understanding, applies to treaty interpretation.[7] This canon of treaty interpretation was not applied by the lower courts. The Circuit Court deferred to the district court's findings as to the parties' treaty understandings (Panel Op., App. 37) and then applied the same treaty interpretation standard utilized by the district court.[8] "We look first at the interpretation understood by the Bands" (Panel Op., App. 36). The district court, in five key instances specifically did not find that there was a textual ambiguity,[9] yet still ruled for the Bands based on a finding that the Indians did not understand the plain meaning of the treaties and the 1850 Order.

In 1850 President Taylor issued an Order specifically revoking the 1837 treaty privilege (App. 565). President Franklin Roosevelt, on March 1, 1938, wrote to the Bad River

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[7] South Carolina v. Catawba, 476 U.S. 498, 506 (1986); Choctaw Nat. of Indians v. United States, 318 U.S. 423, 432 (1943); see also, Amoco Prod. Co. v. Gambell, 480 U.S. 531, 557 (1987); Connecticut Nat. Bank v. Germain, 503 U.S. 249, 112 S.Ct. 1146, 1149 (1992); Immigration & Nat. Serv. v. Cardoza Fonseca, 480 U.S. 421, 452 (1985) (Justice Scalia concurrence).

[8] The "first rule is that Indian treaties must be construed as the Indians understood them." Mille Lacs II, 861 F.Supp. at 822, App. 300); and "first, treaties must be construed as the Indians understood them" Mille Lacs Band of Chippewa Indians v. Minnesota, No. 3-94-1226 (D. Minn. 1997) at 27, (Mille Lacs III), App. 193. "[T]he first rule of construction applicable to the interpretation of Indian treaties requires the treaty language be construed as the Indians understood them, . . .." Mille Lacs Band of Chippewa Indians v. Minnesota, 952 F.Supp. 1362, 1376 (D. Minn. 1997) (Mille Lacs IV), App. 102.

[9] No ambiguity found regarding: "privilege" and "during the pleasure of the President" language from the 1837 treaty, the 1850 Order, the 1855 treaty language, or the 1889 Nelson Act language.

Chippewa Band and confirmed that the 1850 Order revoked the 1837 treaty privilege (letter at App. 575). In the 1950's, the Fond du Lac and Wisconsin Bands participated in Court of Claims litigation and filed pleadings with the Court claiming:

1. "A temporary right to remain in the [1837] ceded area during the pleasure of the President was granted to these Indians. This right was terminated by Executive Order of February 6, 1850. No other action was required to terminate this temporary right" (LA. 11130).

2. "This privilege [1837] was clearly temporary in character . . ." (LA. 11122).

3. "This privilege of hunting, fishing and remaining in the ceded areas (granted to these Indians temporarily) was terminated by Executive order of February 2, 1850. . . ." (LA. 11122).

4. "The Order of February 6, 1850, was never revoked nor extended" (SA. 499).

Nevertheless, the district court in Mille Lacs II stated that, "[t]he evidence shows that the only reason that the 1850 Executive order included language extinguishing the hunting, fishing, and gathering privilege was to facilitate removal of the Chippewa . . ." Id., 861 F.Supp. at 825, App. 310. The Circuit Court concluded that "there is no evidence that revocation of usufructuary rights would have been made independently of the removal mandate" (Panel Op., App. 29-30).[10] The record contains substantial evidence that there were other valid reasons for the 1850 Order stemming from federal land alienation policies, which drove federal Indian policy (LA. 7390, 10611, 10635, 10679-80, 10640). Unrefuted expert testimony of a historical geographer was introduced on this point.

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[10] The Circuit Court did not address the district court's conclusions that removal had been suspended, and privilege revocation required misbehavior.

The President authorized all land sales and issued all federal land patents.[11] The 1850 Executive Order was issued "to remove the occupancy and use rights that had been temporarily granted to the Chippewa in 1837 . . . to facilitate selling the public domain by removing any aboriginal claims to the title to such lands . . ." (LA. 7390) so lands could be sold and settlement encouraged. The survey, sale, and patent process was inconsistent with, and terminated, the treaty privilege. An 1836 Opinion of the Attorney General of the United States confirms that the issuance of land patents terminated any pre-existing Indian use rights.

> [I]n my opinion, the . . . Article of the Treaty . . . with the Chippewa Indians by which 'the Indians stipulate for the right of hunting on the lands ceded with the other usual privileges of occupancy until the land is required for settlement' must be regarded as reserving the use of the ceded land for all the purposes of Indian occupancy as it existed prior to the treaty until such lands shall have been actually disposed of to individuals by the United States. Such disposition may be made by sale under the general

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[11] The land patent granted by President Cleveland in 1895 to one of these Petitioners' predecessor in title with respect to property in the 1837 territory, expressly provided: "TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging, unto the said John Colson and his heirs and assigns, forever." (App. 549) (emphasis added).

> laws or by special grants, or in any other way that Congress may direct. And whenever an actual disposition of any particular tract shall be made, the usufructuary right of the Indians will cease as to such tract.

(LA. 10663-4).

The authorizing statute for the 1855 Treaty, 10 Stat. 598, called for the "extinguishment of [Chippewa] title to all of lands owned and claimed by them in the territory of Minnesota and State of Wisconsin" (App. 532) and the Act made clear that "[t]he laws of the United States and the Territory of Minnesota shall be extended over the Chippewa Territory in Minnesota whenever the same may be ceded, and the same shall cease to be 'Indian country' . . . ." 10 Stat. 598 (App. 533). Thereafter, the Mille Lacs Band entered into the 1855 treaty, 10 Stat. 1165 (App. 502), and accepted a reservation in anticipation that the Chippewa would settle in one place, cultivate the soil, open farms, build houses, and educate their children (1855 Treaty, 10 Stat. 1165, art. IX, App. 513). The Chippewas' lead negotiator, Hole-In-The-Day, was convinced that the Chippewa would live in poverty if they did not change their habits and ideas of acquiring wealth (LA. 809, Transcript of 1855 proceedings). During the 1855 treaty negotiations, he stated:

> We want to change our habits and customs and live like the whites.... You want us to work, to change our habits, and live like the whites, and I see the benefit of your advice, and so do the Chiefs.

(LA.828).[12]

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[12] "We want the right of suffrage, the right to vote, to be subject to your laws, and we have set our hearts upon it." (Hole-In-The-Day

> It is very essential that the Indians shall be thrown on their own resources. The country is getting scarce of game, and we cannot get along without changing our habits. We have tried the old system, and found it wanting. We should therefore try a new one.

(Hole-In-The-Day statement, 1855 negotiations, LA. 836). The Circuit Court nevertheless found that the absence of a specific reference to usufructuary "rights" in the 1855 treaty meant that the federal government did not intend to extinguish the hunting and fishing privilege by the 1855 cession and neither the federal government nor the Bands understood the 1855 treaty to have that effect (Panel Op., App. 35-36).

In 1889 Congress passed the Nelson Act, 25 Stat. 642 (App. 535), calling for the sale and relinquishment of all Chippewa reservations in Minnesota except for White Earth and Red Lake. The consent of the Chippewa Bands was obtained, and the cessions were approved by the President on March 4, 1890 (App. 546-7). During the Nelson Act negotiations on October 4, 1889, in counsel with the Mille Lacs Band, U.S. Commissioner Henry Rice was asked about off-reservation hunting.

> **MUH-ENG-AUNCE** . . . Another thing about the wild animals. If an Indian wishes to go outside of the reservation to hunt deer, will he be allowed to do so in the hunting season? . . .
>
> **MR. RICE** . . . In regard to hunting deer, that is a matter for the Legislature of the State to determine. You can hunt deer in any event, wherever you find them during the

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statement, 1855 negotiations, LA. 830) (emphasis added).

> season set apart for hunting; and wherever the white man may hunt, your young men will have the same right to do so. . . .

(H.R. Exec. Doc. 247, 51st. Cong., 1st Sess. (1890) at 169 (LA. 945) (emphasis added). The Circuit Court did not address the Nelson Act defense appealed by these petitioning Landowners.

In 1946 Congress enacted the Indian Claims Commission Act, 60 Stat. 1049 (App. 550) which created a Commission with the broadest jurisdiction and powers to resolve all Indian claims against the government once and for all.[13] Through their tribes, these Bands filed claims at the Indian Claims Commission alleging interference with their 1837 hunting and fishing privilege, later amending their Petition to include claims for all unconscionable consideration under the 1837 treaty. The hunting and fishing privilege was part of the consideration for the 1837 cession, and in 1974 these Chippewa Bands were awarded over nine million dollars in damages by the Commission for their 1837 treaty claims.

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[13] See Otoe and Missouri Band of Indians v. United States, 131 F.Supp. 265 (Ct. Cl. 1955) (legislative history of effort to pass ICCA); Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455 (10th Cir. 1987); United States v. Dann, 470 U.S. 39 (1985); United States v. Pend Oreille Public Utility Dist. No. 1, 926 F.2d 1502, 1508 (9th Cir. 1991).

## SUMMARY OF REASONS FOR GRANTING PETITION

Animated by the desire to discover a long extinguished hunting and fishing "right" for the Chippewa, the lower courts' decisions, in unrestrained judicial activism, move in a new direction for Indian law contrary to this Court's fundamental principles. The Supreme Court's development of Indian law charts a course for the lower courts to follow. Because of the unique nature of United States/Indian relations, set against the American settlement of the continent and the interplay of state and federal powers, this is akin to a navigational chart through a difficult sea. The Supreme Court has established definite markers for the lower courts, and those ships should follow within its wake. In this case, a ship has broken ranks and is sailing away, far off course.

Unless the Supreme Court takes command of this ship's rudder, and reverses direction, other lower courts will be encouraged to rewrite history and follow this errant course:

> (1) A temporary privilege to hunt and fish has been transformed from an interest "in or to land" into an immunity from state regulation, giving the Chippewa de facto co-management power with the State over half of the natural resources in a twelve county area of Minnesota, under the perpetual supervision of the federal court. Kennedy v. Becker, Oregon Department of Fish & Wildlife v. Klamath Indian Tribe,[14] and the Tenth Amendment no longer provide guidance.

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[14] Kennedy v. Becker, 241 U.S. 556 (1916); Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985).

(2) The President's 1850 Order revoking the 1837 Treaty privilege, affirmed by a subsequent Congress and Presidents, and issued under the express and unambiguous language of the treaty creating the privilege, is canceled by judicial decision 140 years later. Youngstown Sheet & Tube, Dalton v. Specter, and United States v. Choctaw & Chickasaw Nations,[15] are not on this ship's map.

(3) The 1855 Treaty whereby Chippewa "fully and entirely relinquish . . . any and all right, title and interest, of whatsoever nature . . . in, and to any other lands" does not terminate the 1837 privilege, nor does the 1889 Nelson Act cession, because the privilege is not an interest in or to land, but instead is a newly minted judicial exemption from state police power. Klamath just passed on the starboard side.

(4) The finality required by the Indian Claims Commission Act, under which these Bands received payments for the lands and waters at issue, without offset for hunting and fishing, does not bar a suit to set aside the Presidential Order, because the suit is now filed against the State of Minnesota in a collateral attack. Klamath and United States v. Dann, 873 F.2d 1189 (9th Cir.1989) cert. den., 493 U.S. 890 (1989), sink as this ship, buoyed by the opening floodgates, surges into uncharted waters.

Nothing less than whether the history of American/Indian affairs was writ by the historical participants, or will be rewritten by the federal district courts, hangs in the balance.

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[15] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Dalton v. Specter, 511 U.S. 462 (1994); United States v. Choctaw & Chickasaw Nations, 179 U.S. 494 (1900).

The decisions by the lower courts challenge or ignore numerous Supreme Court decisions, the authority of Congressional acts and treaties, and Presidential power in Indian affairs. At stake is the Supreme Court's principled approach to Indian law, the separation of powers, and the very Constitutional structure of state and federal relations which are all implicated by the underlying dispute. Landowners submit this Petition for Certiorari of this case of exceptional public importance[16] which will impact 4.4 million Minnesotans, and devalue the lands and businesses of thousands of landowners and business owners. The Eighth Circuit decision allows 24,000 Band members the permanent right to take, without regard to State law and under de facto co-management authority, up to 50% of the harvestable natural resources in a twelve county area.

## REASONS FOR GRANTING THE PETITION

### I. ACCORDING TO THE CANONS OF TREATY INTERPRETATION, THE DISTRICT COURT ERRED BY EXAMINING INDIAN UNDERSTANDING WHEN THERE WAS NO FINDING OF AMBIGUITY IN THE 1837 TREATY OR OTHER KEY DOCUMENTS IN THE RECORD.

Article V of the 1837 Treaty (App. 486) states:

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[16] The United States' attorney represented in open court on 10/19/93: "This case is not a parochial case that strictly deals with the fate of the treaty rights of the Mille Lacs Band . . [I]t will impact upon Indian tribes throughout the country . . There are tribes all over this country who are going to be watching this case closely, and watching the United States' role in it, and will be taking actions as a result of the decisions reached in this case, as will the United States" (Hearing Trans pp. 5-6, Ex. A to SGF 11-1-93 Aff., LA. 8295).

> [t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States.

No finding of textual ambiguity exists in five key instances: 1837 treaty "privilege" exists "during the pleasure of the President"; the 1850 Presidential order; 1855 treaty; and the 1889 Nelson Act. A court may not look at Indian understanding or expand the text beyond its clear terms to remedy a claimed injustice or to achieve the asserted understandings of the parties.[17]

## II. THE 1837 TREATY WITH THE CHIPPEWA RESERVED **A PRIVILEGE**, SUBJECT TO STATE REGULATION, NOT A RIGHT TO BE FREE OF STATE REGULATION.

Kennedy v. Becker explained the key distinction between a **privilege** to hunt and fish and a **right** to hunt and fish.

> Even if the tribe had expressly reserved a 'privilege of fishing and hunting' on the ceded lands, our precedents demonstrate that such an express reservation would not suffice to defeat the state's power to reasonably and even handedly regulate such activity.

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[17] South Carolina v. Catawba, 476 U.S. 498, 506 (1986); Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943); see Negonsott v. Samuels, 507 U.S. 99, 104 (1993).

Klamath, 473 U.S. at 768-769 (citing, Kennedy). Because a **privilege** is different than a **right**, state regulation on a basis equal to all citizenry is not foreclosed even if the 1837 Treaty privilege still exists.[18] The lower courts failed to acknowledge the 1837 **privilege** as an interest in or to land, instead describing this "treaty right" as an immunity from law. Classifying the usufructuary "privilege" as an immunity from state regulatory authority implicates the Tenth Amendment and opens the floodgates to hunting and fishing claims in a manner rejected by this Court in Klamath.[19] Specifically, the Klamath Tribe's brief argued "a right to hunt and fish free of state regulation is a right separate and apart from an interest in the property itself." (LA. 8668). This argument, rejected in Klamath, has found new life in Mille Lacs.

The Eighth Circuit erroneously concluded that the 1855 Treaty, which created the Mille Lacs Reservation, was concerned with the extinguishment of Indian title to all the land owned and claimed by them, and that extinguishment of title, and sale of land, did not concern usufructuary rights. (App. 36-37). Indian title, of course, included the privilege to hunt and fish.[20] A privilege to hunt and fish is an interest in or to land, not an immunity from regulation. Kennedy, 241 U.S. at 562-564.[21]

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[18] As non-citizens in 1837, after the land sale, Band members did not hold the privilege to hunt and fish at all, absent the 1837 treaty privilege. Elk v. Wilkins, 112 U.S. 94, 123 (1884); Lund testimony LA. 9690.

[19] The trial court, over Landowners' objections, allowed law Professor Thomas Lund to testify as an expert on "wildlife law" to support the immunity theory. Professor Lund's theory was briefed by the Klamath Tribe to the Supreme Court in Klamath to support the Tribe's argument, and the Klamath decision rejects the argument. Id.

[20] Sac & Fox Tribe v. United States, 383 F.2d 991, 997 (Ct. Cl. 1967) (cert. den., 389 U.S. 900) (as cited in, Strong v. United States, 518 F.2d 556, 560 (Ct. Cl. 1975)); United States v. Minnesota, 466 F.Supp. 1382 (D. Minn. 1979) aff'd sub nom. Red Lake Band of Chippewa

## III. THE 1850 PRESIDENTIAL ORDER AND SUBSEQUENT EXECUTIVE ACTIONS REVOKED THE TEMPORARY PRIVILEGE.

The 1837 Treaty language granted a temporary privilege that could be revoked by the President at his will. "The most probative evidence . . . is of course the statutory language . . ." of the treaty. Hagen v. Utah, 510 U.S. 399, 411 (1994). The unambiguous language of the 1837 Treaty granted the President power to revoke the privilege by its plain terms: "during the pleasure of the President."[22]

> When the President acts pursuant to an express or implied authorization of Congress, the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial

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Indians v. Minnesota, 614 F.2d 1161 (8th Cir. 1980); Lac Courte Oreilles Band v. Voight, 700 F.2d 341, 351-52 (7th Cir. 1983) (cert. den. 464 U.S. 805).

[21] Klamath, 473 U.S. at 768-69; Menominee Indian Tribe of Wisconsin v. Thompson, 943 F.Supp. 994, 1018 (W.D. Wis. 1996); see North American Comm. Co. v. United States, 171 U.S. 110, 137 (1898).

[22] See, De Haro v. United States, 5 Wall. (72 U.S.), 559, 10 L.Ed. 681 (1866) (a license is a personal privilege revocable at the pleasure of the party making it); see also, Harris v. Gillingham, 6 N.H. 9, 23 Am.Dec. 701 (1832) (permission to occupy "during the pleasure" of the owner was a license revocable at will); Mole Lake Band v. United States, 139 F.Supp. 938, 940 (Ct. Cl. 1956) cert. den. 352 U.S. 892 (analyzing the 1837 treaty privilege as a "revocable license").

> interpretation, and the burden of persuasion would rest heavily upon anyone who might attack it.'

Youngstown Sheet, 343 U.S. at 637 (Jackson J. concurring). Judicial deference was reaffirmed in Dalton where the Court held that "how the President chooses to exercise the discretion Congress had granted him is not a matter for our review." Id. 511 U.S. at 476. When a statute commits a decision to the discretion of the President, judicial review of that decision is not available. Id. at 477. Arguments including whether or not the President's order was: carried out (or understood) fully by subordinate officers, exceeded his statutory authority, was based on poor recommendations, or did not follow procedural niceties, have all been rejected by Dalton as a basis of invalidating presidential authority.

The attempt to invalidate the President's 1850 order revoking the privilege by applying a "misbehavior" standard for "removal" is unavailing because, even if applicable, these arguments do not make the order unconstitutional. If the President exceeded his statutory authority, that is insufficient under Dalton. Moreover, there is simply no evidentiary or textual support for the proposition that the 1837 Treaty contained either a misbehavior or removal standard for privilege revocation. The Eighth Circuit refused to apply the standard mandated by Youngstown and Dalton. If there is any basis to affirm the President's order, it must be affirmed.

The Circuit Court erroneously dismissed the idea that the President could revoke the privilege without ordering removal,[23] (Panel Op., App. 29). Valid reasons for revoking the privilege in 1850 existed.[24] Under Hagen, the President's interpretation of the 1837 privilege is to be given great weight as "clear evidence of the understanding at the time." Hagen at 420. The President's 1850 Order described the privilege as "temporary" (App. 565). The Circuit Court's decision even fails to acknowledge that the 1850 Order's revocation of the privilege was reaffirmed by President Franklin Roosevelt in 1938 (App. 575). The President's "pleasure" was further expressed by President Cleveland in 1895 when he (and other Presidents) issued patents for the ceded area granting settlers "all rights, privileges, immunities . . . of whatsoever nature . . . forever" (App. 549).[25]

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[23] The 1854 Treaty, 10 Stat. 1109, granting reservations to the Wisconsin tribes after they refused to move to Minnesota following the 1850 Order, establishes the intent of the parties to remove the Wisconsin Chippewa to reservations in lieu of removal to Minnesota. The Petitioners intend to argue this issue on appeal if Certiorari is granted.

While the Bands will argue that this case simply follows Lac Courte Oreilles Band, 700 F.2d 341, that argument fails to acknowledge key differences. LCO had a different factual record and did not involve the 1855 Treaty. LCO also was decided before Klamath's decision on the express language of cession, and the Hagen and Dalton analysis of Presidential power in Indian affairs. See also footnotes 6 and 35.

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[24] Wisconsin statehood had occurred in 1848. Minnesota became a territory in 1849. The population of Wisconsin was exploding exponentially, and the President was being urged by many in the Minnesota-Wisconsin area to issue an order terminating the privilege to encourage settlement and clear title to the public domain to encourage land sales (1849 Territorial Resolution, App. 566, LA. 7390, 10611, 10608, 10679, 10630, 10640, 10663-64).

[25] Even if one assumes arguendo that the President did not have the statutory power from the 1837 treaty to issue the 1850 order because of the Bands' understanding regarding removal, **Congress ratified the revocation** of the privilege when: appropriating money to carry out the Order (9 Stat. 944, 9 Stat. 5701 [App. 525, 530]); ratifying the 1855 treaty; passing Minnesota's Enabling Statute which was silent with respect to the privilege or any limit on State police power; and ratifying the Nelson Act Agreement whereby the Bands agreed to be subject to all State law. See United States v. State of Alaska, 117 S.Ct. 1888, 1910-1911 (1997).

## IV. THE TREATY OF 1855 AND THE NELSON ACT EACH SEPARATELY ELIMINATED OFF-RESERVATION HUNTING AND FISHING PRIVILEGES.

The Supreme Court in Klamath affirmed United States v. Minnesota, 466 F.Supp 1382, 1385 (D. Minn. 1979), aff'd sub. nom. Red Lake Band v. Minnesota, 614 F.2d 1161 (1980) holding that the express language of cession is "precisely suited" to extinguish all hunting and fishing rights or privileges.[26] Id. Neither the trial court nor the Panel decision even references Red Lake, an omission made more astounding by the fact that the Red Lake decision was supported by what Henry Rice told the Mille Lacs Band during the 1889 Nelson Act (25 Stat. 642) proceedings: off-reservation hunting is a "matter for the Legislature of the State to determine." See supra, [LA.945]; United States v. Minnesota, 466 F.Supp. at 1387.

The Eighth Circuit's attempt to distinguish Klamath is unavailing. First, the Eighth Circuit claims that the 1855 Treaty language was not "explicit" (Panel Op., App. 36) in revoking the 1837 privilege, but Klamath rejected the need for a specific reference in the face of the general language of cession. Klamath at 768. The proper test is whether there has been an express reservation of the privilege following the **general language** of cession. Id. at 772-773. The Eighth Circuit erroneously limits Klamath to exclusive on-reservation rights versus non-exclusive off-reservation rights, a distinction without a difference (App. 39).[27] Both exclusive rights and non-exclusive privileges are interests in or to land, and are eliminated by the general language of cession. Klamath, at 768.

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[26] The 1855 treaty, 10 Stat. 1165, contained language first conveying a specific tract of land (App. 502), and then added the separate and additional provision that the "Indians do further fully and entirely relinquish and convey to the United States, any and all right, title and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." (App. 503), see Klamath, 473 U.S. at 768.

The Nelson Act, 25 Stat. 642, together with the 1887 General Allotment Act, 24 Stat. 388, extinguished all Chippewa reservations in Minnesota except two. This Court has consistently ruled that sales of reservation lands, without an express reservation of sovereignty, convey any sovereignty and Indian jurisdiction with respect to the sold lands. Hagen; South Dakota v. Bourland, 508 U.S. 679 (1993); See DeCoteau v. District County Court, 420 U.S. 425, 442-447 (1975); South Dakota v. Yankton Sioux Tribe, ___ U.S. ___, 1998 WL 23149 (1998). In like manner, through the 1855 treaty the Bands ceded any jurisdiction and pre-existing immunity regarding the 1837 treaty area in Minnesota except for those portions of the newly created Mille Lacs reservation that were in the 1837 ceded area.[28] Then, through the 1889 Nelson Act, any immunity from hunting and fishing laws with respect to the former reservation lands was relinquished.

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[27] The converse is actually true: exclusive on-reservation rights are subject to a more stringent extinguishment test than a non-exclusive, off-reservation privilege. As a license, a privilege is lost by a wide variety of inconsistent actions. See footnote 29.

[28] The original Mille Lacs reservation created in 1855 and last ceded in 1889, encompassed 61,000 acres. The 1837 treaty area encompasses more than 6.5 million acres.

## V. THE LOWER COURTS' RULING IMPROPERLY FRACTURES THE CONSTITUTIONAL STRUCTURE OF FEDERALISM RECOGNIZED BY THE 10TH AMENDMENT AND EQUAL FOOTING DOCTRINE.

By failing to recognize the treaty privilege as a revocable license,[29] the district court departed from established principles,[30] holding that the United States "may convey its ability to regulate taking of the wildlife it owns." Mille Lacs II, 861 F.Supp. at 834. In North American Comm. Co. v. United States, 171 U.S. 110, 137 (1898), this Court ruled to the contrary.

> Their regulation [of seal fisheries] involved the exercise of power as sovereign and not as a mere proprietor. Such [federal] governmental powers cannot be contracted away, and it is absurd to argue that in this instance there were any attempts to do so . . .

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[29] "A license is revocable by any manifestation of the licensor's intent to end it. This manifestation may be a formal express notice of revocation, or it may consist of conduct obstructing the erstwhile permitted use, or otherwise inconsistent with the license's continued existence. . . . A license ends on the . . . conveyance of the servient estate by the licensor" 4 Richard R. Powell & Patrick J. Rowhan, Powell on Real Property, Ch. 34 "Easements and Licenses," pp. 34-301 to 34-303 (1997).

[30] Professor Lund also advanced his theory that hunting and fishing rights were not interests in land in Menominee II which specifically rejected this "fallacy in plaintiffs' argument . . .." Menominee II, 943 F.Supp 999, 1018. This is the same argument the Klamath Tribe advanced to the Supreme Court in December of 1984, citing to Professor Lund's 1976 article (Klamath Tribe's Supreme Court brief at LA. 8664-5). See footnote 19, supra.

Id.

The Eighth Circuit erred when stating "[t]here is no federal law commanding state regulation here" (Panel Op. p. 51 n. 44, App. 58). A treaty interpretation which requires[31] the State to allow hunting and fishing by Indian citizens under a separate set of rules created under a different standard,[32] and to oversee implementation of two sets of laws, is contrary to the federal government's historical interpretation of the privilege, and violates Kennedy, Klamath, and Printz v. United States, __ U.S. __, 117 S.Ct. 2365 (1997).

The 10th Amendment issue is whether the federal government, through the 1837 pre-statehood treaty, preempted and usurped state police power when the 1858 Enabling Act for Minnesota, 11 Stat. 285 (App. 515), is silent with respect to any such constraint. Bear in mind that when Minnesota became a state in 1858, the 1837 treaty privilege had already been revoked by a President who labeled it temporary, and was subject to the 1855 treaty relinquishment of all interests in and to land by language of general cession. Such a pre-statehood treaty provision could only bind the state if it concerned a matter where there is clear federal preemption and the limit on State authority is specifically set forth in the

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[31] When compiling and negotiating the Band Hunting and Fishing Code, the State did not do so "voluntarily," but pursuant to the district court's requirements Mille Lacs II, 861 F.Supp. 784, 838-9 (D. Minn. 1994).

[32] In order for the State to include a regulation in the Band Hunting and Fishing Code, it had to "put forth specific evidence establishing why the regulation is a measure '**to forestall the imminence of extinction**'" (Mille Lacs IV, at 39, App. 119) (emphasis added) (citing, United States v. Oregon, 718 F.2d 299, 305 (9th Cir. 1983)).

Enabling Act (App. 515).[33] There is no constitutional basis for preemption of state police power. While Congress has plenary power over Indian tribes it does not have plenary power over states. Congress never stated in the Enabling Act that the temporary privilege would limit Minnesota's sovereignty by acting as a permanent immunity.[34] Therefore, if the privilege still exists, it cannot interfere with the State's normal regulatory plan by requiring a different set of rules for one group of citizens, and necessitating changes in the State's laws.

States do not cede sovereignty and jurisdiction by way of Indian understanding. If the Bands did not understand the course of events, the Chippewa Bands had, and received, a remedy from the Indian Claims Commission. If the United States owes any further obligation to the Bands, it cannot solve its dilemma by taking power from a state, and the lower courts lacked the constitutional authority to do so.

## VI. THE COURT MUST RESOLVE A CONFLICT BETWEEN THE EIGHTH AND NINTH CIRCUITS ON WHETHER THE FINALITY OF THE INDIAN CLAIMS COMMISSION ACT PROCESS BARS A

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[33] "Sovereign power . . . is an enduring presence . . . and will remain intact unless surrendered in unmistakable terms." Bowen v. Public Agencies Opposed to Social Security, 477 U.S. 41, 106 S.Ct. 2390, 2397 (1986). When analyzing Minnesota's Enabling Act (11 Stat. 285) to determine whether there is a constraint on police power, the "clear expression" for treaty abrogation standard is inapplicable. In re Cherokee Tobacco, 78 U.S. (11 Wall. 616, 621) (1870).

[34] United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876) is consistent with this analysis since regulation of Indian commerce is within the federal government's constitutionally delegated preemptive power (U.S. Const. Art. 1, § 8 cl. 3). Further, there was a plain statement in the Act that the federal power at issue would continue after statehood (93 U.S. at 194).

## CLAIM FOR AN ADDITIONAL REMEDY UNDER THE SAME TREATY.

Even if these Chippewa had not prosecuted claims under the 1837 treaty before the ICC, which they have, their claims to reestablish the 1837 treaty privilege would be barred because the ICC was the exclusive forum for their claims for wrongful federal conduct. 60 Stat. 1049 (1946) (App. 550).[35] Treaty claims are subject to the rules of res judicata[36] and election of remedies.[37] The Bands are not entitled to re-litigate issues that were or could have been raised in a previous action. Bear v. United States, 810 F.2d 153, 157 (8th Cir. 1987). "The issue of usufructuary rights arose in various cases brought before the [Indian Claims] Commission under the enabling legislation" Menominee Indian Tribe of Wisconsin v. Thompson, 943 F.Supp. 994, 1017 (W.D. Wis. 1996). "The Claims Commission was not only authorized to consider compensation for lost usufructuary rights but it did so in a number of instances." Id. The initial Docket 18 Petition of the Chippewa specifically claimed the United States had denied to the Indians their right to hunt and fish upon the 1837 ceded lands, and that the usufructuary "rights" were "a material consideration" for the land cessions under various treaties, including the 1837 treaty. The Chippewa Bands had a full and fair opportunity to pursue damages for the taking of the hunting and fishing privilege before the ICC. Therefore, this suit is barred by collateral estoppel.

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[35] The defenses associated with the Indian Claims Commission Act and the Chippewa Bands' receipt of an award in Docket 18-C, were never raised in any of the Lac Courte Oreilles Wisconsin and Seventh Circuit litigation concerning the 1837 and 1842 treaties.

[36] While the State only pursued a collateral estoppel argument on appeal (Panel Op. p. 40, n. 36, App. 44) Landowners appealed their arguments that the ICC damage award in Docket 18-C barred the instant claims by **res judicata**, accord and satisfaction, payment, release, election of remedies as well as collateral estoppel.

[37] The election of remedies doctrine bars a second remedy when damages have been received under the same basic facts and claim. Lane v. Peterson, 899 F.2d 737, 744 (8th Cir. 1990); Haphey v. Linn County, 924 F.2d 152 (9th Cir. 1991); Winfield Ins. v. Edward Leroux Group Inc., 896 F.2d 483, 488 (11th Cir. 1990).

The Bands were well aware of their claims for the hunting and fishing treaty privilege in 1946. The Bands specifically raised the claim in their original Docket 18 Petition. In 1931 Band members were convicted of hunting violations in the 1837 ceded territory (LA. 2742-2747). President Roosevelt confirmed the effect of the 1850 Executive Order in 1938 (App. 575). The Bands admitted as much in their Court of Claims pleadings in the 1950's.[38] The district court lacked jurisdiction to grant equitable relief to the Bands enjoining enforcement of State law because the Bands' claims were barred by the ICCA's five year statute of limitations. Catawba Indian Tribe of South Carolina v. United States, 982 F.2d 1564, 1568-1569 (Fed. Cir. 1993).

The Bands have already been paid in full for the treaty privilege. There was no separate finding by the Commission (ICC) as to the value of the treaty privilege because the Bands and the Commission knew that damages for the "highest and most valuable uses" of the lands and waters (Panel Op., App. 47) (emphasis added) were best measured by the timber value, and this encompassed damages for the hunting and fishing uses of the property. *Klamath*, 473 U.S. at 773-4. The Chippewa admitted in their Docket 18-S[39] action before the ICC that "the fisheries did have value and were an asset to the land" (LA. 3666). This is because whether the treaty privilege is deemed a "usufruct," "license," "profit a prendre" or a "franchise," these are all interests in or to land which are encapsulated in a payment based on full fee title (LA. 3388-3393). "[T]he value of fish, game, and vegetation on the ceded lands was subsumed within the estimated value of the land in general." *Klamath*, 473 U.S. 768, 773-4. The experts for the Bands in Docket 18-C at the ICC claimed that the valuation of the acreage based on the value of the area for pine timber, yielded the highest per acre dollar value. The 1974 damage award of over nine million dollars "in full satisfaction" (SA. 526) of all Docket 18-C claims was based on a full fee value, without any offsets for any retained interests, and included payment for all acres of land *and water* (LA.3274) in the ceded territory.[40]

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[38] The contents of the original Docket 18 Petition, and other ICC and Court of Claims pleadings are admissions against interest, and also support an argument of judicial estoppel. Sunkyongint Inc. v. Anderson Land & Livestock Co., 828 F.2d 1245 (8th Cir. 1987); Ahghazali v. Secretary of Health & Human Svc., 867 F.2d 921 (6th Cir. 1989); White v. Arco/Polymers Inc., 720 F.2d 1391 (5th Cir. 1983).

The premise of the lower courts' rulings is that the treaty privilege is not a subset of fee simple under real property law and therefore a separate payment for hunting and fishing rights would have to be set forth in the ICC Docket 18-C award if the Bands were actually compensated for the treaty privilege. Exactly the opposite is true.

> The Tribe finally contends that the absence of any payment expressly in compensation for hunting and

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[39] The Commission itself stated that, "[t]his case [18-C] is similar to the claims presented by the Minnesota Chippewa and others in Docket Nos. 18-S and 18-T." (LA. 4367).

[40] The ICC paid the Bands for all the waters in the 1837 area by utilizing the dollar value per acre as if all the waters were pine timber.

> fishing rights on the ceded lands demonstrates that the parties did not intend to extinguish such rights in 1901 . . . As explained above, that assumption is incorrect. . . . the value of fish, game, and vegetation on the ceded lands was subsumed within the estimated value of the land in general. Indeed, had the parties actually intended to preserve independent hunting and fishing rights for the tribes on the ceded lands, the Boundary Commission presumably would have computed the value of such rights and explicitly subtracted that amount from the price to be paid for land so encumbered.

Klamath, 473 U.S. at 773-4. When specifically referring to the Indian Claims Commission proceedings, the Court stated:

> the Tribe has since been afforded an opportunity to recover additional compensation for the ceded lands, in light of the '**unconscionable**' **amount** paid in 1906. 20 Ind. Cl. Comm'n at 530. Yet, in that proceeding, which resulted in an award to the Tribe over $4 million. . . . the Tribe apparently agreed that the 'highest and best uses' for the ceded lands were commercial lumbering and livestock grazing, again without mention of any hunting and fishing rights. The absence of specific compensation for the rights at issue is entirely consistent with our interpretation of the 1901 Agreement.

Klamath, 473 U.S. at 774 (emphasis added). Those circumstances are virtually identical to those of the Chippewa whose final, amended Docket 18-C Complaint sought an award for the "fair and just compensation or consideration for the lands ceded . . . [and] damages resulting from defendant's failure to deal fairly and honorably . . . " (SA. 524). The

Bands described their Docket 18-C action as "an unconscionable consideration claim arising out of the cession . . . by the treaty of July 29, 1837 . . ." (LA. 3722). Since the Bands had claimed and admitted in their original Docket 18 Petition that the hunting and fishing privilege was a material part of the consideration for the 1837 cession (SA. 468, LA. 3184-3185), and since the Docket 18-C damages award paid the Bands for all inadequacies in consideration under the 1837 treaty, the Bands have been paid for the value of the treaty privilege.

The Docket 18-C ICC award was based on full fee title, after the Bands first proved they previously held recognized title to the 1837 ceded area.[41] The Ninth Circuit has concluded that when Bands receive damages from the ICC for all inadequacies in the cession of Indian title, the Bands were paid for any hunting or fishing rights.[42] Both aboriginal and treaty reserved hunting and fishing rights are presumed lost, and taken, as the result of an ICC award. The Eighth Circuit classified the privilege as something other than Indian title or an interest in or to land, evading its prior rulings that real property claims came within the exclusive jurisdiction of the ICC.[43]

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[41] "[B]oth aboriginal and treaty-recognized title carry with them a right to use the land for the Indians' traditional subsistence activities of hunting, fishing, and gathering." Lac Courte Oreilles v. Voight, 700 F.2d 341, 351-52 (7th Cir. 1983) (cert. den., 464 U.S. 805).

[42] Western Shoshone National Council v. Molini, 951 F.2d 200, 203 (9th Cir. 1991); United States v. Dann, 873 F.2d 1189 (9th Cir. 1989) (cert. den.); Wahkiakum Band Chinook Indians v. Bateman, 655 F.2d 176, 181 (9th Cir. 1981); See United States v. Pend Oreille Public Utility Dist., No. 1, 926 F.2d 1502, 1508 (9th Cir. 1991).

[43] Oglala Sioux Tribe v. United States, 650 F.2d 142 (8th Cir. 1981); Oglala Sioux Tribe v. Homestead Mining Co., 722 F.2d 1401 (8th Cir. 1983).

The Supreme Court needs to resolve this dispute between the Circuits regarding the proper application of Klamath especially since there are 312 Bands that received an ICC award (LA. 1835). The Court must send a clear message to the Circuits that the ruling in Klamath bars treaty based hunting and fishing claims by Bands which received damages from the ICC for the treaty lands and waters. If such a message is not sent, the Eighth Circuit has drawn the navigational chart for all Bands who were compensated by the ICC for lost lands or reservations to commence collateral litigation against states seeking hunting and fishing rights with respect to the areas sold and for which the tribes were paid.

## CONCLUSION

For the aforestated reasons, the Petition for Certiorari should be granted.

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MOTION FILED

MAR 1 9 1998

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No. 97-1357

In The

# Supreme Court of the United States

October Term, 1997

◆

JOHN W. THOMPSON, et al.,

*Petitioners,*

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,

*Respondents.*

◆

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

◆

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF DEAN CRIST IN SUPPORT OF PETITIONERS

◆

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15 PP

# MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF DEAN CRIST IN SUPPORT OF PETITIONERS

The amicus, Dean Crist, by and through his attorneys, Hinshaw & Culbertson, moves for leave to file a brief in support of the petitioners' case for the following reasons:

1. On February 18, 1998, pursuant to Rule 37, counsel for Mr. Crist sent letters to all counsel of record in the consolidated appeals arising out of the Eighth Circuit's decision in *Mille Lacs Band of Chippewa v. State of Minnesota, et al.*, requesting their consent to his filing of a brief in support of the petitioners.

2. Petitioners, John Thompson et al., and respondents Mille Lacs Band of Chippewa, Red Cliff Band of Lake Superior Chippewa, the Sokoagan Chippewa Community and the individual Mille Lacs plaintiffs, by and through their attorneys, have consented to the filing of the brief.

3. Counsel for respondents, Fond Du Lac Band of Chippewa Indians and Bad River Band of Chippewa Indians, have declined to consent to the filing of this amicus brief.

4. The remainder of the parties have not, as of the filing of this motion, indicated their consent or refusal to consent, although all parties of record in No. 97-1357 were sent letters requesting their consent.

5. The proposed brief of Dean Crist approaches the Indian Claims Commission issue from a different point of view than the petition filed by Thompson *et al.*, and

argues relevant policy issues not addressed by this or the related petitions filed by the State of Minnesota and Aitkin County *et al.*

For these reasons, Dean Crist respectfully requests leave to file a brief *amicus curiae.*

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The saga of the unfettered fishing and hunting rights of Lake Superior Chippewa bands began in Wisconsin with the Lac Courte Oreilles ("LCO") band in the *Voigt* cases, principally with the Seventh Circuit's decision that the Chippewa retained usufructuary rights in the ceded lands notwithstanding an Executive Order by the President in 1850 terminating those rights. *Lac Courte Oreilles Band, etc. v. Voigt*, 700 F.2d 341, 358-62 (7th Cir. 1983). The instant case raises many of the same issues.

After the Seventh Circuit's decision in *Voigt*, Dean Crist founded and became the leader of an organization known as Stop Treaty Abuse-Wisconsin ("STA-W"). This organization published literature and conducted on-site protests against Chippewa spearfishing in off-reservation waters ceded by the tribe in 19th Century treaties. As a result of Crist and STA-W's alleged interference with the usufructuary rights of the Lac du Flambeau band to spearfish in the off-reservation ceded waters, a judgment pursuant to 42 U.S.C. § 1983 was entered against both Crist and STA-W. *Lac du Flambeau, etc. v. Stop Treaty Abuse-Wisconsin*, 41 F.3d 1190 (7th Cir. 1994), *cert. den.*, 506 U.S. 829. Crist is satisfying that judgment pursuant to an agreement with the Lac du Flambeau.

Crist continues to campaign against what he believes to be the misapprehension of the off-reservation fishing rights retained by the Chippewa after the ceding of their lands. More significantly to this case, Crist maintains that the Chippewa have already been fully compensated for the "loss" of their allegedly usufructuary fishing and hunting rights through the filing of a claim and receipt of additional compensation from the Indian Claims Commission. The latter issue was addressed by the Eighth Circuit below, but not by the Seventh Circuit in the *Lac du Flambeau* case because of the waiver of the issue through its untimely raising. *Lac du Flambeau v. Stop Treaty Abuse-Wisconsin, Inc.*, 991 F.2d 1249, 1256-57 (7th Cir. 1992). This case presents the opportunity for Crist, in conjunction with the main petition filed by the State of Minnesota, to have this issue fully explored.

◆

## SUMMARY OF ARGUMENT

The awards of compensation to the Mille Lacs band and other bands of the Lake Superior Chippewa for lands ceded in ancient treaties precludes their claim to special off-reservation fishing rights. The compensation received for the highest and best use of the lands ceded includes all subordinate uses, including fishing rights. The fact that the Indian Claims Commission did not explicitly compensate the bands for ceded fishing rights is either: a) irrelevant, since the Indian Claims Commission awards precluded all claims that were or could have been brought thereunder; or 2) compelling evidence that the bands understood that their off-reservation fishing rights had been validly extinguished by ancient treaties.

Finally, the continued discrimination in favor of the bands in the distribution of natural resources is inconsistent with basic constitutional and social values.

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## ARGUMENT

### I.

### THIS COURT SHOULD ACCEPT CERTIORARI TO END THE HISTORICAL/LEGAL REVISIONISM AND ANACHRONISMS PROPAGATED BY THE EIGHTH CIRCUIT IN THIS CASE AND THE SEVENTH CIRCUIT IN THE *VOIGT* CASES.

This case is an historical and legal nightmare for the nontribal citizens of the states of Wisconsin and Minnesota. The courts of appeals in the *LCO* and *Mille Lacs* cases have had to wade through thousands of pages of 150-year-old accounts of interactions, negotiations and agreements between federal government officials and the aboriginal occupants of the lands in question. In the end, the courts have thrown up their hands and fallen back on the one-sided, but expedient, doctrine of "What did the Indians understand" a/k/a the Indians win. *Washington v. Washington State Commercial Passenger Fishing Vehicle Ass'n*, 443 U.S. 658, 676 (1979), *Mille Lacs*, 124 F.3d at 920.

As a result, in the end, what the natural resource conservationists and other nontribal citizens in Wisconsin and Minnesota have been served up is a warmed over stew of revisionist history and political correctness. This is seasoned with the resentment caused by the Indians' exclusive local franchise to casino gambling and the diminution of the tourist trade in the Lake Superior region. What is then served to the nontribal population in the area is entirely unpalatable. As the cliche goes, it is a recipe for disaster in the form of unequal access to resources and community divisiveness.

And it is all so unnecessary. All of the historical controversy was resolved by the passage of the Indian Claims Commission Act of 1946, 60 Stat. 1049, along with the submission of claims for lands ceded under the several 19th Century treaties by, among others, the Mille Lacs and Wisconsin bands. The Chippewa petition, consistent with the Executive Order of 1850, alleged that the United States had deprived the Chippewa of their rights to hunt and fish on the ceded lands, and sought additional compensation for their "loss." Later, when the 1837 treaty issues were severed from the others, an amended petition was filed making no mention of hunting and fishing rights.

The Eighth Circuit correctly recognized that the Chippewa were compensated by the Commission for the loss of land under the 1837 treaty, with the land being valued at its highest and best use, which was for pine timber and agriculture. The Commission did not *explicitly* value the hunting, fishing and gathering rights allegedly reserved under the 1837 treaty explicitly in its compensation award for those specific losses, despite the fact that the Chippewa had originally complained in their petition that the United States had deprived them of the right to hunt and fish on the ceded lands.

Why, then, did the Eighth Circuit refuse to follow this Court's decision in *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe,* 473 U.S. 753 (1985)? There, the Indian Claims Commission awarded the tribe additional compensation for lands ceded by an ancient treaty. Those lands too were valued at their highest and best uses, which was for stock grazing and timber harvesting. As here, the award by the Commission made no mention of the value of the usufructuary rights lost as the result of the ceding of the lands. Accordingly, this Court held that the Commission award subsumed all of those rights.

With the Chippewa treaty of 1837, however, there was an explicit reservation of usufructuary rights, albeit with the President maintaining the power (superficial as it turned out to be) to abrogate those rights. The *Klamath* treaty did not specifically reserve those rights. The Eighth Circuit seized upon this distinction to hold that the additional payment for the lands in the Chippewa cases, while not mentioning any payment for "retained" usufructuary rights does not preclude the Chippewa from arguing that those rights were: a) not properly taken away by the Executive Order of 1850; and b) not subsumed within the additional compensation awarded for the ceded lands.

This is where the anachronism of "reserved usufructuary rights" comes into play. **The Chippewa did not make a claim for usufructuary rights in Docket 18-C because they: a) understood those rights to have been extinguished by the Executive Order of 1850; or b) because the Treaty of 1855, by which the Mille Lacs ceded land to the United States upon moving to a reservation, extinguished any usufructuary rights which may have survived the Executive Order.** It was not until this litigation and the *Voigt* case in the 1980s that it became "established" that the Mille Lacs continued to enjoy the usufructuary rights retained under the Treaty of 1837. Had there been any sense in 1957 that Chippewa hunting, gathering and fishing rights on the ceded lands were still viable, there would have been an award, or at least some mention in the award, of the right to compensation for the loss.

This is where the preclusive effect of an Indian Claims Commission compensation award should control. It has been consistently held that *all* tribal claims accruing prior to the passage of the Claims Commission Act had to be brought before the Commission or were forever barred. *White Mountain Apache Tribe v. Clark*, 604 F.Supp 185 (D.Ariz 1984), *aff'd*, 784 F.2d 921 (9th Cir. 1985); *Havasupai Tribe v. U.S.*, 752 F.Supp.1471 (D.Ariz 1990). As such, with the Chippewa holding a theoretical claim of infringement of usufructuary rights, whether actually pursued or not, the award of additional compensation pursuant to the statute under Docket 18-C should be *res judicata* to all claims that were or *could have been* brought thereunder.

If anything, despite the political incorrectness of the reasoning, the failure of the Commission to mention the extinguishment of usufructuary rights in its additional compensation award is strong evidence that the **INDIANS THEMSELVES** understood that either there were no such rights remaining, or, at the very least, that the award included compensation for the ancient loss of those rights. Given the fervor with which all bands of the Chippewa seem to value their usufructuary rights, and the Chippewa's current belief that they had been wrongly deprived of those rights, it would seem obvious that any claim to the Commission for those big Commission dollars would have included usufructuary rights had the Chippewa truly believed that those rights had been wrongfully foreclosed. Given these two possibilities, the Chippewa's usufructuary rights are foreclosed under either the preclusive aspect of the 1957 award (if the Chippewa were making a claim for what they believed were still their rights) or the liberal "what the Indians at the time understood" standard (if they thought the rights were extinguished and were NOT making a claim for them).

Moreover, as a matter of simple economic equity, it is rank "double-dipping" for a tribe to be compensated for the loss of land at its highest and best use, then still claim to have rights in the land which involve a use of lesser value. If one sells an object at its highest value, does that not necessarily include selling any less valuable attributes inherent in the object?

Taking the Eighth Circuit's decision to its logical conclusion, one can envision a never-ending succession of claims for aspects of the land not discussed in the additional compensation award of 1957. Suppose, for example, the Chippewa start mining operations on the ceded lands. Under *Klamath*, the mineral rights attendant to the land were subsumed within the Commission's award. But under *Mille Lacs*, because the mineral rights were not included in the 1957 additional compensation award, they would not necessarily be extinguished.

In summary, this Court should accept certiorari to resolve the tension between this case and *Klamath*, and to prevent the continuation of the torture of logic and history for the purpose of a politically correct result.

## II.

## CERTIORARI SHOULD BE ALLOWED TO GUARANTEE EQUAL AND FAIR ACCESS TO THE NATURAL RESOURCES OF THE REGION.

The legalities of the case are of interest to attorneys, judges and litigants. Dean Crist is none of these. His interest in this case is strictly as a resident and sportsman in the lands ceded by the Chippewa in the 19th Century. He assumed a role of prominence, deserved or not, by his vocal and active opposition to the unequal and destructive effects on the resources as the result of the *Voigt* and subsequent litigation.

What this case is fundamentally about is whether one group of Americans, albeit Americans with a slightly different status for various legal and historical reasons, should have unequal access to the natural resources of the region. It is beyond dispute that the government and area residents have a compelling interest in the conservation and promotion of the native fish, game and wildlife. This interest should be paramount to a spurious claim to usufructuary rights, especially where there have been numerous opportunities for the tribe to claim compensation for the supposed infringement of those "retained" rights.

Superficially, the Chippewa have assumed some stewardship of these resources. In Wisconsin, there is some control exercised by the Department of Natural Resources. But there can be no true regulation when one of the primary consumers of the resources is immune from ultimate governmental control. The concept of one group of Americans being subject to resource control, while another group is effectively immune, is antithetical to basic constitutional norms of equality among citizens.

There is no defensible moral reason why an Indian tribesman should enjoy greater rights in a resource than non-Indian citizens. The "right" to fish and hunt on the ceded lands should include the right to fish and hunt consistently with the government's interest in managing and conserving these precious resources. The *Mille Lacs* and *Voigt* decisions trample on this basic moral precept.

Moreover, this outcome is at odds with the whole underlying purpose of the Indian Claims Commission. The Commission was designed to settle once and for all any tribal claims that they had received unfair and unequal treatment from the government in the past. Having submitted themselves to the process and been paid millions of dollars, it is ludicrous to allow them to maintain a claim for superior rights to a scarce natural resource. While there may be no specific constitutional infirmity in this outcome, it smacks of racial inequality inconsistent with the aims and goals of the Equal Protection Clause of the Fourteenth Amendment.

In the conclusion to the Eighth Circuit opinion, there is hope expressed that the Indians and the State of Minnesota will cooperate in resource conservation and management. 124 F.3d at 934. This is all well and good, but as Woody Allen said, "The lion may lie down with the lamb, but the lamb won't get much sleep." The Chippewa judgment effectively exempts them from the laudable goals of equal access to, and conservation of, scarce and precious resources. This Court, in addition to resolving the legal tensions stemming from the various decisions in this area, should accept certiorari to assure equal access to this resource.

Respectfully submitted,

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Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1997

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COUNTY OF AITKIN, *et al.*,

*Petitioners,*

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*,

*Respondents.*

◆

JOHN W. THOMPSON, *et al.*,

*Petitioners,*

vs.

UNITED STATES OF AMERICA, *et al.*,

*Respondents.*

◆

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

◆

# BRIEF FOR THE CITIZENS EQUAL RIGHTS ALLIANCE (CERA) AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

◆

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## QUESTIONS PRESENTED

WHETHER THE NELSON ACT WAS INTENDED BY CONGRESS AS A DISPOSAL ACT TO EXTINGUISH ALL RIGHT, TITLE, CLAIM AND INTEREST TO LANDS AND THE USUFRUCTURY RIGHTS OF THE TREATY OF 1855 UPON THE LANDS INCLUDING THE RIGHTS TO HUNT, GATHER WILD RICE AND FISH OF THE MILLE LACS BAND OF CHIPPEWA?

WHETHER THE UNITED STATES CONSTITUTION GRANTS TO THE JUDICIAL BRANCH THE AUTHORITY TO COMPEL THE STATE OF MINNESOTA TO REGULATE HUNTING, GATHERING OF WILD RICE AND FISHING ON STATE AND PRIVATE LAND FOR THE PRIMARY BENEFIT OF THE MILLE LACS BAND OF CHIPPEWA BY REINSTATING AN INDIAN TREATY?

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## INTEREST OF THE AMICUS CURIAE[1]

The Citizen's Equal Rights Alliance (CERA), is a non-profit association of non-Indians and Indians incorporated and licensed under the laws of the State of New Mexico and headquartered in Santa Fe, New Mexico. CERA's interest in this lawsuit arises from CERA's advocacy of the principle that all people should be treated equally, whether Indian or non-Indian. In this, CERA's interest mirrors that of Petitioners. The Chippewa Bands' position that they are entitled to the reinstatement of treaty rights to avoid application of state police power authority to regulate hunting, fishing and gathering rights applicable to all other state citizens, violates the principle of equal rights under law. This amicus brief supports the Petitions for Certiorari for the Counties, Docket No. 97-1356 and the Landowners, Docket No. 97-1357.

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## SUMMARY OF THE ARGUMENT

The main argument of this brief challenges the authority of the Courts of the United States to reinstate treaty rights deemed extinguished or terminated for eighty years by all parties. Upon the land cession of the Mille Lacs Band and their consent to be placed on a reservation by the treaty of 1855, Congress placed the termination of the treaty rights on non-reservation land to hunt, fish and gather wild rice at the pleasure of the President. President Zachary Taylor terminated the usufructuary treaty rights by Executive Order on February 6, 1850. this termination and further act of full extinguishment of the Mille Lacs reservation by the Nelson Act of 1889, ch. 24, 25 Stat. 642, §§ 3, 5 and 6, was treated by the United States as an extinguishment not only of the reservation but also of the treaty rights until 1970. In 1970, the United States with a change of Indian policy to restore tribal sovereignty, brought suit on behalf of the Leech Lake Band of Chippewa to restore the usufructuary treaty rights from the Treaty of 1837. *Leech Lake Band of Chippewa v. Herbst,* 334 F. Supp. 1001 (D.Minn. 1971). The 1837 Treaty established all of the claimed treaty privileges for all of the Chippewa Bands, including Mille Lacs. Although there were multiple land cession treaties with the various Chippewa Bands, the restoration argument of the Bands and the United States has not varied in the many cases brought by the United States has not varied in the many cases brought by the United States on behalf of the different Bands. This case, therefore, shares many facts and potential consequences with the *Leech Lake Band of Chippewa v. Cass County* case, Docket No. 97-174, already briefed and argued before this Court.

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

By unanimous opinion of the court in *State of Alaska v. Native Village of Venetie,* 1998 WL 75038 (U.S.), 118 S.Ct. ___ (1998), this Court ruled that Congress' intent to extinguish or terminate an Indian reservation is the paramount consideration in examining whether a reservation was actually terminated. This reasoning comports to the plain language of the Property Clause, Art. IV, Sec. 3, Cl. 2, that "Congress shall dispose of the territories . . . " This very simple reasoning makes Congress accountable for the use of the territorial war powers. There is no question that Congress intended with the Nelson Act of 1889 to terminate all of the Chippewa reservations except Red Lake and White Earth. Congress has never acted in any way to restore the Mille Lacs reservation. There is a real question whether the constitutional power exists in Congress to restore only the usufructuary treaty rights to any Indian Tribe over lands no longer in its jurisdiction under the Property Clause. Instead of leaving this question to Congress, the Federal Courts in the Eighth Circuit decided they would restore the treaty rights of the 1837 Treaty to the Mille Lacs Band at the urging of the Executive Branch. This amicus brief challenges whether the federal courts have jurisdiction under Art. III to even hear a suit brought by the Executive Branch asserting Property Clause authority.

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## STATEMENT OF CASE

Beginning in 1971 with the Leech Lake Band of Chippewa, the United States on behalf of different bands of Chippewa Indians, a tribe recognized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., has brought several lawsuits against the State of Minnesota to reinstate Indian treaty rights deemed extinguished by all parties from the 1890's to 1970. Mille Lacs is the latest seeking to reinstate the hunting, wild rice gathering and fishing rights. So far for the Chippewa, the United States has participated in more than six suits in Minnesota and Wisconsin for the Chippewa which displace the regulatory powers of those states to administer the hunting, gathering and fishing rights on state and private lands.

Minnesota and Wisconsin are not public land states with vast amounts of federal land available for withdrawal or reservation. The use of the term "reservation" as to the Mille Lacs Band is a misnomer. The "reservation" designation flows from the fact that some Indians still own land and the Band has purchased land within the original boundaries of the reservation expressly terminated by the Nelson Act of 1889, ch. 24, 25 Stat. 642. The United States refers to the Mille Lacs "reservation" because it asserts that the 1837 treaty rights still exist. The United States claims that the possible existence of an unextinguished Indian treaty right requires a court to find that these privately owned lands are "Indian country" and therefore are "Indian territory" entitling the Indian Band to protection of their treaty right under the Treaty Clause, Art. II, Sec. 2 and thereby the Supremacy Clause, Art. VI, Cl. 2. This argument in effect creates permanent reservations with sovereign rights at least equal if not actually superior to the states. See *Leech Lake Band of Chippewa v. Cass County* briefs.

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## ARGUMENT

### I.

### INTRODUCTION

The Mille Lacs decisions of the Eighth Circuit conflict with the decisions of this Court in *South Dakota v. Bourland,* 508 U.S. 679 (1993) and *South Dakota v. Yankton Sioux Tribe,* 118 S.Ct. 789 (1998) which interpret the extinguishment of Indian lands as also being an extinguishment of Indian Treaty claims. The *Yankton Sioux* argument presented by the United States for the tribe was very similar to the reasoning used in this case. The Eighth Circuit ruled for the tribe in that case as well. Just as the Eighth Circuit was overruled in *Yankton Sioux,* so should it be in this matter. As *Yankton Sioux* observed, these cases fall within a line of termination cases which began with *DeCoteau v. District County Court.* See, e.g., *DeCoteau v. District County Court,* 420 U.S. 425 (1975).

The *DeCoteau* Court determined that the State of South Dakota possessed jurisdiction because the reservation had been extinguished and could not be "restored" by the Secretary. In overruling the Eighth Circuit, the Court established the process used to determine whether the use and occupancy rights of the Tribe were terminated. *DeCoteau,* 420 U.S. at 442-47. For the first time, the court distinguished between extinguishment acts and surplus lands acts. A conclusion of termination indicates permanent extinguishment of all tribal interest in the land. For the lands in question, the compliance with the Nelson Act met this exacting standards, as well as the standard expressed in *Hagen v. Utah,* 114 S.Ct. 958 (1994), for the disestablishment of "Indian country." Nelson Act of 1889, ch. 24, 25 Stat. 642 (1889). The Nelson Act is the Minnesota version of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, §§ 5 and 6.

The Eighth Circuit discussion of the Nelson Act is based upon an error which fails to acknowledge the impact of *Hagen v. Utah,* on the *Seymour v. Superintendent* interpretation of the criminal statute defining "Indian country." Compare 18 U.S.C. § 1151 (1994) with *Hagan v. Utah,* 114 S.Ct. 958 (1994) and *Seymour v. Superintendent,* 368 U.S. 351 (1962). As the recent *Native Village of Venetie* decision makes crystal clear, the definition of the "Indian country" requires a federal set aside of land. In this case there is no federal set aside of these lands upon which the hunting, gathering of wild rice and fishing is supposed to take place. In 1971, the federal district court of Minnesota in *Leech Lake Band v. Herbst,* 334 F. Supp. 1001, 1005 (D. Minn. 1971), inappropriately relied on *Seymour* to hold that the 1855 Treaty with the Chippewa was not extinguished by the Nelson Act. *Leech Lake Band of Chippewa Indians v. Herbst,* 334 F. Supp. 1001, 1005 (D.Minn. 1971); see, e.g., *Leech Lake Band v. Cass County,* 108 F.3d 821 (opinion by Judge Murphy); *Mille Lacs Band of Chippewas v. Minnesota,* 861 F. Supp. 784 (1994) (same); *Mille Lacs Band of Chippewas v. Minnesota,* 853 F. Supp. 1118 (1994) (same). The Eighth Circuit since 1971 has consistently held that the usufructuary treaty rights specifically recognized in the treaty of 1837 were not extinguished by the termination of the 1855 treaty rights because the acts of Congress and express language of the President were not made sufficiently clear to the Chippewa. The Eighth Circuit has always addressed the extinguishment from the perspective of the Indians' understanding, based on the United States' trust responsibility, and never addressed whether a power to restore Indian treaty rights not reserved at statehood exists under the Constitution of the United States.

By relying on "Indian country" as an exemplar of tribal sovereignty, the Eighth Circuit ignored the principle that "Indian country" has no relevance to an express extinguishment act of Congress and can provide no limitation thereto. See *Hagen v. Utah,* 114 S.Ct. at 967. The Eighth Circuit, without expressly citing the law of the case or res judicata, has continued to use its 1971 precedent of *Herbst* for all Chippewa cases proceeding after the initial Leech Lake Band decision. In doing so, the Eighth

Circuit has completely avoided applying the extinguishment line of cases to any of the Chippewa Bands claims, including Mille Lacs. The new decisions of *South Dakota v. Yankton Sioux Tribe,* 118 S.Ct. 789 (1998) and *State of Alaska v. Native Village of Venetie,* 1998 WL 75038 (U.S.), 118 S.Ct. ___ (1998) directly contradict the Eighth Circuit land status rationale as to treaty rights extinguishment and "Indian country" respectively.

In no way can the Nelson Act be construed as anything but a disposal act. The Nelson Act disposed of all lands which had been reserved for the Leech Lake Band and the Mille Lacs Band, under allotments, timber sales or homesteads. 25 Stat. 642. The Eighth Circuit Court of Appeals' extrapolation of the initial *Herbst* error to prevent the lawful operation of a proper disestablishment act only makes the error more needful of correction. Judge Murphy's expansive view of treaty cases which are no longer proper precedent led her to prevent extinguishment of treaty rights, where the disestablishment act required relinquishment of all right, title, and interest to the reservation. The Eighth Circuit has not reviewed the first impression ruling of *Leech Lake Band v. Herbst* after the case law on extinguishment developed in higher courts. The fundamental shift in higher precedent leaves the Eighth Circuit on uncertain ground and in need of redirection.

## II.

## DISPOSAL OF THE TERRITORIES IS A REQUIREMENT WHICH PROTECTS FEDERALISM.

Congressional power over territorial lands was meant to be temporary. As the Constitution provides, "Congress shall dispose of the Territories . . . " U.S. Const., Art. IV, Sec. 3, Cl. 2. The principle mandating disposal has long been upheld by this Court. See *U.S. v. Midwest Oil*, 236 U.S. 459 (1915); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), *U.S. v. Gratiot*, 39 U.S. (14 Pet.) 525 (1840). In other areas, Congress itself recognized the temporary nature of its regulatory authority. See Federal Land Policy Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 et seq. Additionally, this Court recently required specific congressional action to create permanent reservations in a state. *Alaska v. United States*, 117 S.Ct. 1888 (1997); see also *New Mexico v. Watkins*, 969 F.2d 1122 (D.C.Ct.App.1992) (affirming in part, and on Property Clause grounds, 783 F. Supp. 633 (D.D.C.1992)).

Congress expressly terminated the Mille Lacs reservation with the Nelson Act. After the 25 year trust period expired, the Mille Lacs tribal rights to these lands and all of the rights upon these lands were extinguished. The United States, through the Clinton Administration, is attempting to subvert the old cases of *Fletcher v. Peck*, 10 U.S. (6 Cr.) 87 (1810) and *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) and fundamentally alter the sovereignty balances set by the Constitution. The United States acknowledged, in the Treaty with the Chippewa of 1855, that it held sovereign title to the lands under the Property Clause, Art. IV, Sec. 3 and that the Bands held only "Indian title." This "Indian title" gave only a right to use and occupy the land until the right was terminated by Congress. "Indian title" has been transformed by clever legal wording referring to the lands as "Indian territory" into a full sovereign claim over the land. Congress has given the tribes many powers of self-government but has never linked the powers to land status. The power Congress has allowed the tribes flows completely from Congress. Any delegation of authority is revocable at will because there is no sovereign connection to the "Indian territory." The Clinton administration is literally attempting to expand the definition of the word "territory" just as they have expanded the definition of "reservation" into any lands where any Indians live.

Whatever Indian sovereignty existed in the Mille Lacs Band was determined by the Treaty and is entirely subject to the plenary authority of Congress. *United States v. Kagama,* 118 U.S. 375 (1886). Even under the Treaty of 1855, the Mille Lacs Band was not the supreme sovereign over this land. The Treaty acknowledged the territorial sovereignty of the United States. From 1855 until the termination of the reservation by the Nelson Act in 1889 -- with the disposal by sale of the lands – these lands were federal reserved public domain lands. Arguably until the 25 year trust period expired for the final sales and disposition of the lands, the United States retained territorial jurisdiction against the states on the allotted lands acquired by Indians. The State of Minnesota accepted jurisdiction and exercised full jurisdiction over former Chippewa lands under the Nelson Act until 1971 when in a case of first impression, the federal district court erroneously concluded that the Nelson Act was not a termination of the usufructury treaty rights of the Leech Lake Band of Chippewa.

Although asserted under the guise of unextinguished treaty rights, this case is merely a variation on a theme – the United States attempting to forcibly displace state jurisdiction. There is no practical difference between an

Indian tribe reacquiring lands by purchase or by asserting a claim to an extinguished treaty right. Tribal purchase of lands in fee simple alone does not divest state jurisdiction. It is only the interpretation the United States has placed on its General Welfare/Spending Clause, Art. 1, Sec. 8, Cl. 1, trust responsibility through the Indian Reorganization Act and the Indian Self-Determination Acts which purport to dispossess state jurisdiction. This argument is fully made to the Court in an Amici Curiae Brief submitted by CERA in the current Leech Lake case. The questions presented in this case demonstrate an overall problem with judicial review created in the *Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857) decision. That problem stems from the two holdings which dealt specifically with the Court declining to protect constitutional rights in territories of the United States and the use of the political question to prevent the Court from ever revisiting the perpetuation of slavery in the territories.

Although the Thirteenth Amendment effectively overruled the first holding in *Scott v. Sandford* concerning the ability to make freed Negro citizens, the rest of the majority decision has been left completely intact. To this day the Court has never reexamined its authority in the territories. Constitutional rights still do not apply to persons residing on lands subject to the plenary authority of Congress under the Property Clause. This is precisely the result the Founding Fathers attempted to prevent with the structure of the Constitution because they had fought the Revolutionary War to gain full citizenship rights for the former territorial colonies of Great Britain. As George Mason, the most prominent Anti-federalist, predicted in his speech to the Constitutional Convention, because of slavery, this very carefully constructed structural balance to protect the People's rights would not hold. He demanded a Bill of Rights and the battle for ratification began. It is hard to believe that more than two hundred years later we are still having the same fight, especially after such a costly Civil War. The Civil War did result in the Amendments needed to fix the territorial problem. It also resulted in a virtually completely Federalist victory. Even though the Southern States gave three major chances to the Supreme Court to apply the Fourteenth Amendment against the territorial war powers, three times the Court declined and used the rationale of *Scott* without citing to the actual decision to deny jurisdiction. *State of Mississippi v. Johnson,* 71 U.S. (4 Wall.) 475 (1867); *Georgia v. Stanton,* 73 U.S. (6 Wall.) 50 (1868); and *Texas v. White,* 74 U.S. (7 Wall.) 700 (1869).

It is not the purpose of this brief to question the result of the Civil War. The purpose is to question why the Supreme Court has never placed the will of the People in the passage of the Civil War Amendments back into the dominant position in the structural balance. To this day, the definition of "sovereign people" in Black's Law Dictionary is still the perverted definition from *Scott v. Sandford.* No group of people has been more victimized by this inaction on the part of the Supreme Court than the Indian people. The Indian people, although called citizens because of the Naturalization Act of 1924, 8 U.S.C. § 1401, only have rights when they are not on territorial lands. How much of this result flows from the fact that the Indian cases of *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831) and *In re Kansas Indians,* 72 U.S. (5 Wall.) 737 (1867) became a major part of the Reconstruction Act debate will be left for historians to decide if the result is ever altered by this Court. Certainly, the words of Justice

Davis in *In re Kansas Indians* quoting the 1854 Treaty with the Shawnee have been ignored. "It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, 'but until they are clothed with the rights and bound to all the duties of citizens' they enjoy the privilege of total immunity from state taxation." Id. at 756. Indian citizenship has not changed the willingness of the Court to confront the territorial war powers.

Under the current United States perspective, Indian treaties were made outside of the territorial boundaries of the United States. Congress has never passed any act for or against the Indian tribes which disclaims territorial jurisdiction of the United States over lands currently or formerly occupied by Indian tribes. This argument asserted by the Executive Branch attempts to displace Congress' plenary power over the Indian tribes and its Property Clause authority. Instead, it places a potentially unlimited power to reinstate treaties within the territorial boundaries in the Executive Branch under the Department of Justice. These reinstated treaties hope to displace state jurisdiction by reasserting the Supremacy Clause to both reinstate the Indian property rights and to attach Indian sovereignty rights to the land. Although this Court has a long history of avoiding applying the Fourteenth Amendment to Indian cases because of the direct conflict between the Fourteenth Amendment protections and the Property Clause's inherently unaccountable powers, the reinstatement of treaty rights without examining the Fourteenth Amendment consequences goes too far.

The United States asserts it is merely protecting tribal interests by reasserting these treaty rights. However, the United States' claim that these reasserted treaty rights are treaties under the terms of the Supremacy Clause entitled to assertion as the supreme law of the land creates an ability to completely displace state law. The Supremacy Clause requires that the treaty be made under the authority of the United States Constitution to be the supreme law of the land. The adoption of the Fourteenth Amendment in 1868 essentially prevented any more treaties from being negotiated with the Indian tribes. There is no doubt that at the time of negotiating and ratifying the Indian treaties, the United States used the treaties primarily to negotiate land cessions. The 1855 Treaty with the Chippewa was a treaty of cession. These land cessions were originally executed under the authority of the Treaty Clause. However, the power to administer the lands as territory was in the Property Clause.

The Treaty Clause defines a mandatory process, necessary to create a treaty. It carefully separates and balances the power of the Executive Branch to enter into international agreements against the power of Congress to make domestic law. There is no point of having a constitution to limit the domestic powers of the federal government if the international powers are unlimited and superior to domestic law. The United States is incorrect in asserting that the Supremacy Clause creates such a result. Entering into a treaty does not alter the doctrines of separation of powers or checks and balances. The decision to enter a treaty requires both the President and the Senate for ratification. The treaty power is a very carefully constructed political process. The Executive can enter a treaty which then is not ratified by the Senate, rendering the treaty null and void. The most famous example of this was President Wilson and his League of Nations inclusion at the end of World War I which failed ratification in the Senate. This political decision was not subject to judicial review. It is an inherently political decision whether a treaty passes this constitutional process.

Reinstating a treaty cannot be done by the courts under the Treaty Clause because it violates the political process created in the clause. The treaty power does not bestow upon the courts any authority except to review whether the other branches adhered to the required process. The power being asserted by the Eighth Circuit to restore the 1837 Treaty is actually derived from the Property Clause. To allow reinstatement of treaties, judicial review must include the ability to overrule an express political decision to extinguish or terminate Indian reservations made by Congress to dispose of the public domain lands. No party in this case has questioned the constitutionality of the Nelson Act. Again, the courts undoubtedly possess the power to review whether the disposal act contained sufficient process to protect constitutional rights. The courts as demonstrated by *DeCoteau* and the whole line of extinguishment cases, may set due process requirements which Congress must meet. Lands not properly disposed may still have Indian treaty rights attached subject to the plenary authority of Congress to remedy. However, ensuring due process is not an exercise of an affirmative power to restore Indian rights over land specifically disposed. This is a power not contained in Art. III.

While Art. III does allow judicial review to determine if property rights were taken or civil rights were violated by the United States in extinguishing a treaty, the power does not extend to review of the political decision to terminate. This includes not only the power of Congress under the Property Clause but also the power of the Executive under the Treaty Clause. In this case, the Eighth

Circuit actually managed to violate separation of powers against both other branches by reinstating the treaty against an express termination by Congress and by ignoring the President's exercise of properly and expressly delegated power to terminate the 1837 treaty privileges. The fact that Indian policy was altered subsequently does not affect the fact the President ended the privilege.

The United States Supreme Court correctly ruled in the extinguishment line of cases starting with *DeCoteau v. District County Court* that the extinguishment is examined from the Intent of Congress at the time of passage of the disposal act. The Eighth Circuit erred in examining the Mille Lacs treaty claim from the United States perspective that the Nelson Act should be interpreted based upon present law. The Eighth Circuit should have followed the extinguishment line of cases and ruled that the treaty rights were extinguished. By following the United States perspective, the Court became the instrument to impose an ultra vires restriction on Minnesota's jurisdiction to regulate hunting, fishing and wild rice gathering on state and private lands.

## III.

## THE PURPOSE OF JUDICIAL REVIEW IS TO PROTECT THE RIGHTS OF THE PEOPLE FROM USURPATION BY GOVERNMENT.

The case at bar is an excellent example of how the Court's order does not completely divest Minnesota of jurisdiction – it compels Minnesota to exercise its regulatory authority in a manner defined by the court. The Eighth Circuit ordered the State of Minnesota to enter an agreement with the Mille Lacs Band, placing the tribal "treaty" rights ahead of all other use rights on Mille

Lacs.[2] This type of court order is the worst sort of federal mandate. See *Leech Lake Citizens Committee v. Leech Lake Band of Chippewa Indians,* 355 F. Supp. 697 (D. Minn. 1973). Certainly, the constitutional reasoning is identical to that asserted by Congress to compel specific state regulatory action. See, e.g., *Printz v. United States,* 117 S.Ct. 2365 (1997), *New York v. United States,* 505 U.S. 144 (1992). This result is just as unconstitutional as a federal mandate which compels a state to regulate a specific way according to a federally funded program.

It is particularly disturbing to see a federal court caught in this separation of powers violation. An Article III court must protect the rights of all the people in an unbiased manner. The credibility of the courts depends on the people believing they are fair and impartial in the protection of constitutional rights. Part of that responsibility is ensuring that the elected representatives of the People may politically be held accountable by the People. When government policy based on territorial power favors a minority over the majority, the People literally have no right to even question the authority in court and cannot hold their elected representative accountable for discrimination which occurs outside of their district. It is a true "slippery slope" problem because by the time the discrimination hits the majority, it is too late to remedy the initial claim of territorial power. The perfect example of this assertion is in *Kansas v. Colorado,* 206 U.S. 46 (1907) discussing the Property Clause power against the Tenth

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[2] This agreement will survive the Leech Lake ruling of this Court unless a direct order issues requiring the Eighth Circuit to review its Mille Lacs rulings based upon the decisions of the current term.

Amendment concerning the Reclamation Act of 1902, 32 Stat. 388.

> "These arid lands are largely within the Territories, and over them by virtue of the second paragraph of section 3 of Article IV heretofore quoted, or by virtue of the power vested in the National Government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found, mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation." *Kansas v. Colorado,* 206 U.S. at 92.

It only takes a reading of the Clean Water Act, 91 Stat. 1566, 33 U.S.C. § 1251, et seq., and its amendments to realize that this judicially approved discrimination against the Western States has now spread to include all of the States in regards to wetlands and tribal grants of authority to regulate, 33 U.S.C. § 1377 of the Clean Water Act, under the same power analysis as the Reclamation Act.

The Mille Lacs decisions, like the Leech Lake decisions, hold that the United States is not accountable for placing the rights of the Mille Lacs Band ahead of the rights of the majority of the citizens of the State of Minnesota. The decisions make it seem this is a proper role for the federal government instead of the extra-constitutional action it is.

Federalism is the separation of powers doctrine which protects the states from intrusions by *any* of the federal branches on powers reserved to the states. It is unusual that this intrusion is from the Judicial Branch because of the limitations placed in Art. III. This is not an original jurisdiction action which grants very broad authority to this Court on very limited subjects. The Eighth Circuit is claiming appellate jurisdiction includes an affirmative constitutional power to act to remedy the disposal of the Mille Lacs reservation.

There is no constitutional power which allows the United States Congress or any other branch of the federal government to unilaterally divest state jurisdiction and to make it federal except under direct war power authority. The intent of the disposal of the public domain was to create states to prevent the territorial war powers from becoming perpetual. Throughout the discussions of the overall effect of the territorial powers was a great concern articulated by the Anti-federalists about maintaining a standing army. No group of persons understood that constitutional rights were not recognized in a territory because of the war power authority under English common law better than the men that started our Revolutionary War and drafted this Constitution. They specifically worded Art. IV, Sec. 3 to place the creation of states in Clause 1 ahead of the compelled disposal of the territory in Clause 2. These clauses have been erroneously interpreted separately for too long. The first Clause is an express limitation on the second.

Ultimately, the reinstatement power is a question of the nature of judicial review. If judicial review is primarily to protect the People's rights then the People are the supreme sovereign. If judicial review was intended to further the power of the national government, then the government is the supreme sovereign. Under the first analysis the courts are accountable to the People to protect their rights. Under the second analysis the courts become the most dangerous branch of government to the People. In point of fact, this second result has happened because the trial courts do not examine the constitutionality of a federal mandate before they apply it to a father delinquent on child support or to protect the rights of a part Indian child to be with the only parents the child has ever known.

The Court must decide the nature of judicial review in either this case or apply its decision on this fundamental question from the *Leech Lake v. Cass County* case already before this Court. The Fourteenth Amendment confrontation with the Property Clause power is ripe and must be decided before lower courts, both state and federal, lose all credibility by refusing to hear cases because they must overrule federal mandates that contribute major amounts of money to state budgets. No trial judge can take on the responsibility for terminating state funds without major support from the United States Supreme Court that it must be done to protect civil rights.

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## CONCLUSION

The decisions of the Eighth Circuit Court of Appeals should be reversed. This Court should grant the petition to allow this correction and to address the important judicial review question presented by the Eighth Circuit not reviewing its 1971 precedent against a whole line of Supreme Court decisions to the contrary.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MINNESOTA, ET AL., PETITIONERS

*v.*

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

COUNTY OF AITKIN, ET AL., PETITIONERS

*v.*

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

JOHN W. THOMPSON, ET AL., PETITIONERS

*v.*

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the usufructuary rights guaranteed to the Chippewa Indians on aboriginal lands that they ceded to the United States by an 1837 Treaty were terminated by the operation of the equal footing doctrine when Minnesota was admitted to statehood in 1858.

2. Whether an 1855 Treaty, in which one of the respondent Chippewa Bands, the Mille Lacs Band, relinquished "all right, title, or interest" in and to its remaining lands other than those set aside for its Reservation, extinguished that Band's usufructuary rights under the 1837 Treaty.

3. Whether an Executive Order issued in 1850, which ordered the involuntary removal of the Chippewa from the lands ceded by the 1837 Treaty, extinguished their usufructuary rights with respect to those lands.

4. Whether the various respondent Chippewa Bands are precluded, as a result of their participation in proceedings before the Indian Claims Commission, from asserting their usufructuary rights under the 1837 Treaty.

5. Whether the Chippewa Indians' exercise of usufructuary rights under the 1837 Treaty should be limited by the "moderate living" doctrine of *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

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# In the Supreme Court of the United States

OCTOBER TERM, 1997

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No. 97-1337

STATE OF MINNESOTA, ET AL., PETITIONERS

*v.*

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

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No. 97-1356

COUNTY OF AITKIN, ET AL., PETITIONERS

*v.*

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

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No. 97-1357

JOHN W. THOMPSON, ET AL., PETITIONERS

*v.*

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-73) is reported at 124 F.3d 904. The opinions of the district court are reported at 853 F. Supp. 1118 (*Mille*

*Lacs I*) (Pet. App. 351-418), 861 F. Supp. 784 (*Mille Lacs II*) (Pet. App. 212-350), and 952 F. Supp. 1362 (*Mille Lacs III*) (Pet. App. 74-163). Additional opinions of the district court (Pet. App. 164-211 and 419-481) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on August 26, 1997. A petition for rehearing was denied on November 17, 1997. Pet. App. 7. The petition for a writ of certiorari in No. 97-1337 was filed and docketed on February 17, 1998, the day after a federal holiday. The petitions for a writ of certiorari in No. 97-1356 and No. 97-1357 were filed on February 17, 1998, and docketed on February 18, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case concerns whether the Chippewa Indians' rights to hunt, fish, and gather wild rice on aboriginal tribal lands—"usufructuary" rights expressly preserved by a treaty ceding those lands to the United States—were subsequently relinquished by the Tribe or abrogated by the United States. The same rights under the same treaty were before the Seventh Circuit in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *Voigt*, 700 F.2d 341, cert. denied, 464 U.S. 805 (1983), which concluded, consistent with the Eighth Circuit's decision in this case, that the Chippewa Indians continued to possess those rights.

1. The lands involved in this case are the Minnesota portion of a tract, totalling more than 13 million acres, that the Chippewa Indians ceded to the United States by the Treaty of July 29, 1837, 7 Stat. 536 (Pet.

App. 484).[1] (The remainder of the tract, which lies in Wisconsin, was the subject of *Lac Courte Oreilles Band.*) The 1837 Treaty provided that "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [*sic*] to the Indians, during the pleasure of the President of the United States." Art. 5, 7 Stat. 537. The Treaty contained no provision for the removal of the Indians from the ceded lands.

On February 6, 1850, President Taylor issued an Executive Order that stated, in pertinent part:

> The privileges granted temporarily to the Chippewa Indians of the Mississippi by the fifth article of the treaty made with them on the 29th of July 1837 "of hunting, fishing and gathering the wild rice upon the lands, the rivers and the lakes included in the territory ceded" by that treaty to the United States * * * are hereby revoked; and all of the said Indians remaining on the land ceded aforesaid, are required to remove to their unceded lands.

Pet. App. 253.

The United States did not attempt to forcibly remove the Chippewa from the ceded lands. The government did, however, seek to induce the Indians to relocate by moving the Chippewa agency, where the Indians received their annuity payments, to unceded lands some distance from the ceded lands. Pet. App.

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[1] All "Pet. App" citations refer to the appendix to the petition in No. 97-1337. The petition in No. 97-1337 is cited as "Minn. Pet.," the petition in No. 97-1356 as "County Pet.," and the petition in No. 97-1357 as "Thompson Pet."

257. But the Chippewa remained on the ceded lands. And, in 1851, the Acting Secretary of the Interior suspended the removal effort. *Id.* at 260-261. It was never resumed. *Id.* at 264.

In 1854, the United States negotiated a treaty that provided for the cession to the United States of all of the remaining lands occupied by the Lake Superior Chippewa east of the Mississippi and established reservations for the Chippewa Bands within the lands ceded by the 1837 Treaty and by a second treaty negotiated in 1842. Treaty of Sept. 30, 1854, 10 Stat. 1109. The 1854 Treaty reserved the signatory Bands' right to hunt and fish on the newly ceded lands. The respondent Fond du Lac and Wisconsin Bands of Chippewa Indians were parties to the 1854 Treaty; respondent Mille Lacs Band was not.

The United States negotiated a second treaty in 1855 to acquire additional lands of the Chippewa, including the Mille Lacs Band. Treaty of Feb. 22, 1855, 10 Stat. 1165. Article I of the 1855 Treaty, after ceding all of the Bands' right, title, and interest in a tract with defined boundaries, went on to state that

> the Indians do further fully and entirely relinquish and convey to the United States any and all right, title, and interest, of whatsoever nature the same may be, which they now have in, and to, any other lands in the Territory of Minnesota or elsewhere.

10 Stat. 1166. Article II of the 1855 Treaty established the Mille Lacs Reservation within the territory ceded by the 1837 Treaty. 10 Stat. 1166-1167. The 1855 Treaty made no mention of usufructuary rights.

2. In 1990, the Mille Lacs Band and several of its members filed suit in federal district court against the State of Minnesota, seeking a declaratory judgment that they continued to possess usufructuary rights with respect to the Minnesota portion of the lands ceded in the 1837 Treaty. They also sought an injunction against the State's interference with those rights. The United States intervened as a plaintiff, and nine Minnesota counties and six individual landowners intervened as defendants.

The court bifurcated the case into two phases: the first was to determine whether, and to what extent, the Chippewa retained usufructuary rights on the ceded lands, while the second was to determine how any such rights were to be exercised. In 1994, the court concluded, after a trial on the first phase, that "the privilege guaranteed to the Chippewa of hunting, fishing, and gathering the wild rice upon the lands, the rivers and the lakes included in the territory ceded to the United States by the treaty of 1837 continues to exist." Pet. App. 350. The court specifically held that those rights were not extinguished by the 1850 Executive Order or the 1855 Treaty. See *id.* at 304-334.

The court then allowed several Wisconsin Bands of Chippewa to intervene as plaintiffs. The State moved for summary judgment against the Wisconsin Bands, arguing, *inter alia*, that their usufructuary rights had been extinguished by the 1854 Treaty. The State also argued that the Wisconsin Bands were collaterally estopped from asserting their usufructuary rights claims as a result of their participation in previous litigation before the Court of Claims and the Indian Claims Commission. The court denied the State's motion. Pet. App. 164-211.

The Fond du Lac Band, and several of its members, had filed a separate suit in 1992, seeking a declaration that they retained the usufructuary rights conferred by the 1837 Treaty and the 1854 Treaty. In 1996, the district court held that the Fond du Lac Band continued to possess its usufructuary rights under both treaties. Pet. App. 419-481.

The Fond du Lacs suit was consolidated with the Mille Lacs suit for the second phase of the case. The State and the Bands stipulated to a Conservation Code and Management Plan to regulate the exercise of usufructuary rights under the 1837 Treaty. The district court also resolved certain other issues that remained in dispute, concluding, among other things, that the defendants had demonstrated no need for an allocation of the resources on the ceded land. Pet. App. 128-152.

3. The State, together with the intervening counties and landowners, appealed. The court of appeals affirmed on all issues. Pet. App. 1-73.

*First*, the court concluded that the Chippewa's usufructuary rights were not validly extinguished by the 1850 Executive Order, which purported to revoke those rights and to require the removal of the Chippewa from the ceded lands. Pet. App. 21-31. The court explained that President Taylor had no authority to order the removal of the Chippewa without their consent, because Congress had authorized the President only to convey lands west of the Mississippi to "such tribes or nations of Indians as *may choose* to exchange the lands where they now reside, and remove there." Act of May 28, 1830, ch. 148, § 1, 4 Stat. 412 (emphasis added). Accordingly, because "Congress required consent for removal, and the Bands did not consent, then President Taylor had no authority for his 1850 Executive Order of removal." Pet. App. 27. The court further determined that the portion of the Executive Order mandating removal of the Chippewa was not severable from the portion revoking their usufructuary rights, finding "no evidence that revocation of usufructuary rights would have been made independently of the removal mandate." *Id.* at 29-30. The court therefore held that "the entire 1850 Executive Order is invalid." *Id.* at 31.[2]

*Second*, the court of appeals held that the 1854 Treaty, which set aside certain lands as reservations for the Wisconsin Bands and the Fond du Lac Band (but not the Mille Lacs Band) in exchange for their cession of title to other lands, did not extinguish those Bands' usufructuary rights under the 1837 Treaty. Pet. App. 31-34. The court concluded that the present case is legally and factually distinguishable from *United States* v. *Santa Fe Pacific Railroad*, 314 U.S. 339, 357-358 (1941), which held that a Tribe's acceptance of a reservation "amounted to a relinquishment of any tribal claims to lands * * * outside that reservation." The court explained that, whereas the Indians' claim in *Santa Fe* was based on aboriginal title, the Chippewa's claim here is based on rights reserved under the 1837 Treaty. Pet. App. 33. The court also found the evidence to be "overwhelming that neither party intended the 1854 Treaty to disturb usufructuary rights." *Id.* at 34.

*Third*, the court of appeals held that the 1855 Treaty, which created a reservation for the Mille

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[2] The court of appeals did not address the district court's several alternative grounds for finding that the 1850 Executive Order did not validly revoke the Chippewa's usufructuary rights. Pet. App. 31 n.25.

Lacs Band on some of the lands ceded by the 1837 Treaty, did not extinguish that Band's rights to fish, hunt, and gather wild rice on the rest of those lands. Pet. App. 34-39. The court declined to construe the Band's relinquishment of "any and all right, title and interest" in and to "any other lands in the Territory of Minnesota" as extending to the usufructuary rights reserved under the 1837 Treaty. *Id.* at 35. The court noted that those rights were not mentioned in the 1855 Treaty or in the negotiations that produced it. *Id.* at 37. And the court found ample support in the record for the district court's factual findings that neither the Band nor the United States had intended the 1855 Treaty to extinguish those rights. *Ibid.* The court concluded that a contrary result was not required by *Oregon Department of Fish & Wildlife* v. *Klamath Tribe*, 473 U.S. 753 (1985), which held that a Tribe had relinquished its right to hunt and fish on certain reservation lands when it ceded all "claim, right, title and interest" in those lands. Pet. App. 38. The court explained that the usufructuary rights in *Klamath* were "exclusive and *on-reservation* rights, and thus logically extinguished with a relinquishment of a portion of the reservation," whereas the usufructuary rights in this case are "*non-exclusive* and *off-reservation* rights" that were reserved by treaty prior to the creation of the reservation. *Id.* at 39.

*Fourth*, the court of appeals concluded that the Wisconsin Bands and the Fond du Lac Band were not collaterally estopped, as a result of their participation in *Mole Lake Band* v. *United States*, 126 Ct. Cl. 596 (1953), from litigating whether they retain a right to fish, hunt, and gather wild rice on the lands ceded by the 1837 Treaty. Pet. App. 39-45. The court held that collateral estoppel did not apply because the Bands' usufructuary rights under the 1837 Treaty were not "actually litigated" in the Court of Claims. *Id.* at 43-44.

*Fifth*, the court of appeals held that the Wisconsin Bands and the Mille Lacs Band likewise were not collaterally estopped as a result of their participation in proceedings before the Indian Claims Commission seeking compensation for lands ceded under the 1837 Treaty. Pet. App. 45-51. The court rejected the argument that the Commission's award, which compensated the Bands based on the highest and best use of those lands, subsumed the value of the Bands' usufructuary rights. The court concluded that the Commission's silence with respect to usufructuary rights could not be given the same effect in this case as in *Klamath*, *supra*, reasoning that the Commission would not have "extinguished an important body of rights bargained for and explicitly reserved in a treaty without any mention of those rights." *Id.* at 50.

*Sixth*, the court of appeals held that the Bands' usufructuary rights under the 1837 Treaty were not extinguished, sub silentio, under the equal footing doctrine when Minnesota was admitted to statehood in 1858. Pet. App. 52-59. The court, while applying the analysis of *Ward* v. *Race Horse*, 163 U.S. 504 (1896), and *Crow Tribe of Indians* v. *Repsis*, 73 F.3d 982 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996), reached a different result on several grounds. The court reasoned that, whereas the hunting rights in those cases were "temporary" because they could be exercised only so long as the lands at issue remained unoccupied and within the ownership of the United States, the usufructuary rights in this case are of a "continuing" nature not tied to ownership of the lands. Pet. App. 55 & n.42. The court also concluded, relying on this Court's decisions in *United States* v. *Winans*, 198 U.S. 371 (1905), and *Tulee* v. *Washington*, 315 U.S. 681 (1942), that the United States' agreement in the 1837 Treaty to preserve the Chippewa's usufructuary rights on the ceded lands "does not offend the State's sovereignty." Pet. App. 58. The court further held that Congress must clearly express its intent to abrogate Indian treaty rights, and that no such expression of congressional intent to abrogate the Chippewa's rights under the 1837 Treaty was contained in the Act of Congress admitting Minnesota to statehood. *Id.* at 59.

*Seventh*, the court of appeals rejected the argument that the "moderate living doctrine," as articulated in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), should be applied to limit the Chippewa's exercise of usufructuary rights under the 1837 Treaty. Pet. App. 59-67. The court explained that the moderate living doctrine is not implicated unless, as in *Fishing Vessel*, a natural resource is determined to be so scarce that it must be apportioned between treaty and non-treaty users: "The moderate living doctrine does not establish a *right* to apportionment, but is rather a part of the *method* of apportionment once a court has determined that division of a resource is necessary." Pet. App. 67 (citing *Fishing Vessel*, 443 U.S. at 685-686). The court concluded that no showing had been made that "any resource at issue is in ecological danger," and thus in need of apportionment between the Chippewa and other users. *Id.* at 65. The court noted that the State and the Chippewa had agreed to a Conservation Code and Management Plan, which would restrict the Band's hunting, fishing, and gathering on the ceded lands covered by the 1837 Treaty, and that the State had conceded that "under the Code, there was no danger of depletion of resources." *Ibid.*

*Finally*, the court of appeals, rejecting the Bands' cross-appeal, affirmed the district court's holding that, because the 1837 Treaty does not confer a right of access to land, the Bands' members may exercise their rights only on public lands and on private lands that are open to public hunting, fishing, and gathering generally and indiscriminately. Pet. App. 70-72.

## ARGUMENT

The court of appeals' decision involves nothing more than the application of settled law to the particular facts and circumstances of this case. It does not conflict with any decisions of this Court, other courts of appeals, or the Minnesota Supreme Court. Indeed, the Seventh Circuit reached the same result in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *Voigt*, 700 F.2d 341, cert. denied, 464 U.S. 805 (1983), which sustained the Chippewa's usufructuary rights under the same treaty. No more reason exists in this case than in *Lac Courte Oreilles Band* for this Court to grant plenary review.

1. The State initially contends (Minn. Pet. 10-15) that the decision below conflicts with *Ward* v. *Race Horse*, 163 U.S. 504 (1896), and *Crow Tribe* v. *Repsis*, 73 F.3d 982 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996), in holding that the Bands' usufructuary rights under the 1837 Treaty were not abrogated when Minnesota was admitted to the Union on an equal footing with other States. The Eighth Circuit applied the same legal standard to petitioners' equal footing claim as did this Court in *Race Horse* and the Tenth

Circuit in *Repsis*. However, because the facts and circumstances of this case are different from those of *Race Horse* and *Repsis*, the court correctly reached a different conclusion.

This Court explained in *Race Horse* that, when an Indian Tribe possesses treaty rights with respect to lands not yet within any State, whether those rights continue to exist after statehood depends upon their character: The Tribe's rights survive if they "are of such a nature as to imply their perpetuity," as opposed to being "temporary and precarious." *Race Horse*, 163 U.S. at 515; accord *Repsis*, 73 F.3d at 988. The Tribes' treaty rights in *Race Horse* and *Repsis* "to hunt upon the unoccupied lands of the United States" were held to be "temporary" in nature. 163 U.S. at 515; 73 F.3d at 991.

The court of appeals applied *Race Horse*'s continuing/temporary distinction in this case. But the court concluded that the Chippewa's treaty rights to "hunt[], fish[] and gather[] the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" were intended by the parties to be "continuing rights." Pet. App. 55. The court contrasted the rights at issue here with those in *Race Horse* and *Repsis*, which would terminate, by their terms, as soon as the lands were no longer "unoccupied" or owned by the United States. Such a fact-specific determination, which turns on the particular text and history of the 1837 Treaty, does not warrant review by this Court. See *Repsis*, 73 F.3d at 988 (recognizing that whether Indian treaty rights have survived statehood under *Race Horse* requires examination of "the literary and historical context of the treaty").

The court of appeals' decision is consistent, moreover, with this Court's post-*Race Horse* decisions.

The Court has recognized, for example, that the Yakima Indians' treaty right to "tak[e] fish at all usual and accustomed places" survived Washington's admission to the Union. *United States* v. *Winans*, 198 U.S. 371, 382-384 (1905); see *Tulee* v. *Washington*, 315 U.S. 681, 684 (1942) (*Winans* held that the treaty "conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area"). The Court emphasized that the Yakima's fishing rights were reserved by, not granted to, the Indians in the treaty. See *Winans*, 198 U.S. at 381 ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."). It was "surely * * * within the competency" of the federal government, said the Court, "to secure to the Indians such a remnant of the great rights they possessed." *Id.* at 384. The Court added that such a reservation of rights would not "restrain the State unreasonably, if at all," in its regulation of its natural resources. *Ibid.* Similarly, the court of appeals recognized here that the Chippewa's reservation of the right to fish, hunt, and gather on the lands ceded by the 1837 Treaty "does not offend the State's sovereignty," because "the Bands' rights can be reconciled with the State's regulation of the natural resources within its borders." Pet. App. 58.[3] See also *Antoine* v. *Washington*, 420

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[3] The continuing vitality of *Race Horse*'s rationale has been questioned by courts and commentators. See, *e.g.*, *Holcomb* v. *Confederated Tribes of Umatilla Indian Reservation*, 382 F.2d 1013, 1014 n.3 (9th Cir. 1967) ("[T]he strict holding of *Ward* v. *Race Horse* has been modified by implication in subsequent decisions."); *State* v. *Tinno*, 497 P.2d 1386, 1393 n.6 (Idaho 1972) ("*Race Horse* and the theory it posited have been entirely

U.S. 194, 205-206 (1975) ("Congress exercised its plenary constitutional powers to legislate those federally protected rights, * * * * [which] so preserved may, of course, not be qualified by the State") (internal quotation marks omitted).[4]

Moreover, notwithstanding *Race Horse*, this Court has made clear over the past century that hunting regulations are an appropriate subject of federal legislation and treaty making, and that the federal government's exercise of such power in any given State does not place that State on an unequal footing. For example, in *Kleppe* v. *New Mexico*, 426 U.S. 529, 541 (1976), the Court rejected a claim that federal regulation of wild horses and burros, pursuant to the Property Clause, impermissibly intruded "on the sovereignty, legislative authority, and police power of the State." When legislating regarding federal lands, the Court explained, Congress's enactments "necessarily override[] conflicting state laws under the

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discredited by the Supreme Court") (citing *United States* v. *Winans*, and *Tulee* v. *Washington*, *supra*); R.N. Clinton, et al., *American Indian Law* 820 (3d ed. 1991) ("*Winans* clearly rejected the view that the equal footing doctrine limits the exercise of treaty-guaranteed off-reservation hunting and fishing rights.").

[4] In *Antoine*, unlike in *Race Horse*, the State was admitted into the United States two years *before* the federal agreement that reserved the Indians' hunting rights. 420 U.S. at 200. This Court has recognized, however, that the question with regard to the equal footing doctrine is not whether a federal law relating to Indians was enacted before or after a State's admission, but rather whether that federal law violates the State's sovereignty. *Johnson* v. *Gearlds*, 234 U.S. 422, 439 (1914). In *Antoine*, the Supreme Court held that the federal agreement reserving Indian hunting rights did not violate Washington's sovereignty.

Supremacy Clause." *Id.* at 543; see generally *Missouri* v. *Holland*, 252 U.S. 416, 432-435 (1920) (holding that exercise of Article II treaty power as a basis for federal authority over wildlife does not offend 10th Amendment).

2. Petitioners next contend (Minn. Pet. 15-20; County Pet. 15-17) that the court of appeals' conclusion that the 1855 Treaty between the United States and certain Chippewa Bands, including respondent Mille Lacs Band, did not revoke those Bands' usufructuary rights under the 1837 Treaty conflicts with *Oregon Department of Fish & Wildlife* v. *Klamath Tribe*, 473 U.S. 753 (1985). As the court of appeals recognized (Pet. App. 39), however, this case does not involve a "situation * * * analogous" to *Klamath Tribe.*

The court of appeals began its analysis of petitioners' claims regarding the 1855 Treaty by examining, and affirming, the district court's factual findings, which were based on its "careful examination of the historical record established at trial." Pet. App. 35-38. The district court had determined that "(1) the government did not intend for the 1855 Treaty to extinguish the usufructuary rights reserved in the 1837 Treaty, (2) the Chippewa did not intend to give up their 1837 Treaty privilege and they did not understand the 1855 Treaty to have that effect, and (3) both the Band and the United States believed that the 1837 Treaty rights continued to exist after the 1855 Treaty was signed." *Id.* at 35-36 (citations omitted). In affirming those findings, the court of appeals noted "the absence of any mention of the 1837 Treaty or its usufructuary rights in the 1855 Treaty or its negotiation process," as well as "the lack of evidence that the parties intended to extinguish these rights." *Id.* at 37.

Petitioners nonetheless contend that the 1855 Treaty must, as a matter of law, be construed as extinguishing the signatory Bands' usufructuary rights under the 1837 Treaty. They base that argument solely on the Bands' relinquishment in the 1855 Treaty of "any and all right, title and interest * * * which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere," other than the lands set aside for their reservation. Art. I, 10 Stat. 1166. According to petitioners, because the Court construed similar language in *Klamath* as abrogating the Indians' usufructuary rights, the same result must obtain here.

*Klamath* did not address the present question whether a treaty in which a Tribe generally conveys to the United States its "right, title and interest" in and to "any * * * lands"—other than the lands being set aside as its reservation—must be construed as implicitly extinguishing the usufructuary rights that the Tribe had expressly reserved by treaty on certain lands previously conveyed to the United States. The issue in *Klamath* was whether, when a Tribe ceded "all [its] claim, right, title and interest in and to" a particular piece of land, the Tribe implicitly reserved its right to hunt and fish on that land. 473 U.S. at 753. The Court's decision in *Klamath*, like the court of appeals' decision here, turned on the text and historical context of the particular agreements at issue. See 473 U.S. at 755 (noting that decision was based on "the terms of the 1901 Cession Agreement," "the predecessor 1864 Treaty," and "certain other events in the history of the Tribe"). The Court concluded that the Klamath Tribe's usufructuary rights, which had been granted to them by the 1864 Treaty that created its reservation, were meant to exist only "within the limits of the reservation." *Id.* at 766. The Court reached that conclusion based on the treaty's provisions stating that (i) the Tribe's fishing rights extended only to "the streams and lakes included in said reservation," (ii) the Tribe's gathering rights extended only "within [the reservation's] limits," and (iii) the Tribe's rights were "exclusive," which would not "be possible on lands open to non-Indians." *Id.* at 767 (quoting Treaty of Oct. 14, 1864, 16 Stat. 708). Accordingly, when the Tribe ceded certain of its reservation lands to the United States in 1901, the Tribe no longer retained any rights to hunt and fish on those lands, because those rights "did not exist independently of the reservation itself." *Id.* at 768.

The Chippewa's usufructuary rights on the lands subject to the 1837 Treaty, in contrast, exist independently of the ownership status of those lands. The Chippewa ceded title to the lands in the 1837 Treaty, while expressly reserving the right to hunt, fish, and gather wild rice on the lands. Moreover, while the Klamath's usufructuary rights were exclusive, and thus could not exist on lands removed from the reservation, the Chippewa's usufructuary rights were not exclusive. It was understood that the Chippewa could not exclude others from the lands ceded by the 1837 Treaty. Nothing in *Klamath* required the court of appeals, in a case involving different agreements and different historical circumstances, to hold that the 1855 Treaty extinguished the Chippewa's rights under the 1837 Treaty. Indeed, *Klamath* recognizes (473 U.S. at 765-766 & nn. 16, 17) that "Indians may enjoy special hunting and fishing rights that are independent of any ownership of land," such as those recognized to exist in *Antoine*, *supra*; *Winans*, *supra*; and *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

The State contends (Minn. Pet. 16) that the usufructuary rights here, like those in *Klamath*, were tied to land title, because the 1837 Treaty did not specify that the rights could be exercised "at all usual and accustomed places," as did the treaties in some of the Court's cases, and instead reserved the rights on all lands ceded by the 1837 Treaty. *Klamath* did not suggest, however, that usufructuary rights may be severed from land title only if they are to be exercised at "usual and accustomed places." To the contrary, *Klamath* cited *Antoine*, *supra*, and *Kennedy* v. *Becker*, 241 U.S. 556 (1916)—in each of which the Tribe retained hunting and fishing rights on lands ceded to the United States without reference to "usual and accustomed places"—as examples of rights that are independent of land ownership. See 473 U.S. at 765-766 & nn. 16, 17. The State's proposed distinction between the usufructuary rights here, which were reserved in a "geographic area," and rights reserved at "usual and accustomed places" thus has not been recognized by this Court or any court of appeals. And such a distinction would be an unlikely basis for a rule of law in any event, since the phrase "usual and accustomed places" describes "geographic areas."

Finally, petitioners' arguments based on the 1855 Treaty, if accepted by the Court, would have little practical effect even in this case, much less in any other case. Those arguments are directed at the usufructuary rights only of the Mille Lacs Band, and not of the other respondent Chippewa Bands, which were not parties to the 1855 Treaty.

3. Petitioners also challenge the court of appeals' conclusion that the 1850 Executive Order, which purported to order the removal of the Chippewa from the lands ceded under the 1837 Treaty and to revoke their rights to hunt, fish, and gather wild rice on those lands, was invalid in its entirety. The court held that the removal provision was invalid because Congress, in the Act of May 28, 1830, ch. 148, 4 Stat. 411 had authorized such removal only with a Tribe's consent, which had not been secured from the Chippewa. The court further held, based on the historical record, that the removal provision was so "integral to the entire Order" that it could not be severed. Pet. App. 29.

a. The State does not dispute that President Taylor had no authority to issue the portion of the Executive Order directing the removal of the Chippewa from the ceded lands without their consent. Nor does the State dispute that the court of appeals applied the proper severability test, based on *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932), to determine whether the invalidity of one provision of the Executive Order (*i.e.*, the provision ordering the Chippewa's involuntary removal from the ceded lands) defeated the validity of the other provision (*i.e.*, the provision revoking the Chippewa's usufructuary rights). The State nonetheless seeks review of the court of appeals' application of that severability test to the particular Executive Order at issue here. But asserted errors involving "the misapplication of a properly stated rule of law" ordinarily do not warrant the Court's review. Sup. Ct. R. 10.

The State contends (Minn. Pet. 21-22) that the court of appeals should have held that the revocation provision was valid, independent of the removal provision, because the 1837 Treaty permitted the President "to terminate the Chippewa's hunting and fishing rights at his pleasure." The court of appeals rejected that argument, without reaching the question of the extent of the President's authority under the 1837 Treaty with regard to the Chippewa's usufructuary rights,[5] applying the severability test that the State concedes is the correct one. The court concluded (Pet. App. 28-29) that, although the Order contained two provisions that "seem separate," they could not be severed, because the historical record established that "[t]he purpose of the Order was to mandate removal, and this purpose was integral to the entire Order." The provision revoking the Indians' usufructuary rights was included merely "to encourage removal." *Id.* at 29. It is well-established that when "it is evident the legislature would not have enacted one [clause of a statute] without the other—as when the two things provided are necessary parts of one system—that the whole act will fall with the invalidity of one clause." *Huntington* v. *Worthen*, 120 U.S. 97, 102 (1887).

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[5] Petitioners argue here, as they did below, that the 1837 Treaty gave the President unfettered discretion to revoke the Chippewa's usufructuary rights at any time and any reason. See Minn. Pet. 21-22; County Pet. 13-14; Thompson Pet. 17-18. As noted in the text, however, the court of appeals found it unnecessary to resolve that issue, given its ruling that the Order's revocation provision, whether or not it would have been valid standing alone, could not be severed from the invalid removal provision. There is no reason for this Court to grant certiorari to decide issues of treaty construction that the court of appeals did not reach.

b. The counties, although not the State or the landowners, contend (County Pet. 11-15) that the courts below were barred by the separation of powers doctrine from considering whether the 1850 Executive Order was valid. But this Court has recognized that courts may, in appropriate circumstances, assess the validity of Presidential action that is alleged to exceed the authority granted by Congress or the Constitution. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); *Cole* v. *Young*, 351 U.S. 536, 557-558 & n.20 (1956); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

The counties' argument is predicated, moreover, on a mischaracterization of this case an involving "a judicial challenge against a President who terminated treaty provisions" (County Pet. 12), such as that involved in *Goldwater* v. *Carter*, 444 U.S. 996 (1979) (granting petition, vacating judgment, and remanding for dismissal).[6] The respondent Bands brought this action to *confirm* their rights under the 1837 Treaty, not to terminate the Treaty or to invalidate the 1850 Executive Order. It was petitioners who asserted the Executive Order as a defense to the Bands' treaty claims. The counties cite no authority holding that the federal courts, in actions properly within their jurisdiction, cannot adjudicate the scope or validity of

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[6] No conflict exists between this case and *Goldwater* v. *Carter*, *supra*. That case, which involved a dispute between co-equal Branches of the federal government over the power to terminate a treaty, raised complex separation-of-powers and foreign policy issues that are absent here.

Executive Orders raised in support of, or in opposition to, a party's claim.

c. The district court also held (Pet. App. 319-321) that the 1850 Executive Order, even if valid, had been repealed by implication. The district court reasoned that the federal government not only did not enforce the Executive Order, but also took action inconsistent with it, such as by establishing reservations for the Bands on the very lands from which they were to have been removed under the Order. The court of appeals did not reach that (or any other) alternative ground given by the district court for holding that the 1850 Executive Order did not revoke the Bands' usufructuary rights. *Id.* at 31 n.25; see *id.* at 312-316 (addressing other grounds for decision). Accordingly, even if petitioners were to prevail on their challenge to the court of appeals' ruling on the validity of the revocation provision of the Executive Order, other grounds would remain available to the court on remand to conclude that the Bands' usufructuary rights survived the Executive Order.[7]

4. The landowner petitioners contend (Thompson Pet. 24-25) that the Bands are barred, by principles of res judicata and collateral estoppel, from asserting

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[7] The Eighth Circuit's ultimate conclusion on the Executive Order issue is consistent with that of the Seventh Circuit in *Lac Courte Oreilles*, 700 F.2d at 361-362, which held that the 1850 Executive Order was invalid because it exceeded the scope of, *inter alia*, the 1837 Treaty, which the Seventh Circuit construed as authorizing the revocation of the Chippewa's rights only if the Indians misbehaved. See also *State* v. *Gurnoe*, 192 N.W.2d 892, 900 (Wis. 1972) (concluding that 1850 Executive Order "was never effective," and thus did not extinguish Chippewa's fishing rights, because Chippewa continued to reside and exercise fishing rights on ceded lands).

their usufructuary rights claims because they could have asserted such claims in earlier proceedings in the Indian Claims Commission (ICC). The landowners' claims are without merit, present no conflict with the decisions of this Court or other courts of appeals, and involve no question of recurring significance.

The court of appeals did not address any res judicata issue, observing that "the State abandoned its res judicata defense" (Pet. App. 44 n.36), and apparently not perceiving the landowners to have preserved one. No viable res judicata defense could exist here in any event. The doctrine of res judicata, or claim preclusion, bars only those claims that could have been asserted in prior litigation between the same parties or their privies. *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979). None of the defendants in this case were parties, or in privity with parties, to the ICC proceedings.

Nor are the Bands' usufructuary rights claims barred by the doctrine of collateral estoppel, or issue preclusion, which applies only to "an issue of fact or law, actually litigated and resolved by a valid final judgment." *Baker* v. *General Motors Corp.*, 118 S. Ct. 657, 664 n.5 (1998). As the court of appeals recognized (Pet. App. 46-48), those claims were neither litigated nor resolved in the ICC proceedings.

The landowners also contend (Thompson Pet. 26-27) that the Bands' usufructuary rights were extinguished by the ICC award, which compensated the Bands for the lands ceded by the 1837 Treaty based on their "highest and most valuable uses." They contend that under *Klamath*, *supra*, the value of the Bands' usufructuary rights was necessarily subsumed within the ICC award—notwithstanding that those rights were not put at issue in the ICC proceedings or mentioned in the ICC's lengthy opinion. The court of appeals properly rejected that argument based on the "crucial distinctions" between *Klamath* and this case. Pet. App. 50. As noted above, the Court was concerned in *Klamath* with the construction of the 1901 Agreement, which ceded to the United States "all [the Tribe's] claim, right, title and interest in and to" certain lands, without any mention of its usufructuary rights. The Court declined to read into the Agreement an implicit reservation of those rights. At the end of its opinion, the Court observed that an ICC award of additional compensation for those lands—which likewise contained no reference to usufructuary rights—"is entirely consistent with our interpretation of the 1901 Agreement." 473 U.S. at 774. The ICC's silence here is equally consistent with the court of appeals' construction of the 1837 Treaty as preserving the Chippewa's usufructuary rights. It cannot be supposed that the ICC would have "extinguished an important body of rights bargained for and explicitly reserved in a treaty without any mention of those rights." Pet. App. 50.

The landowners further contend (Thompson Pet. 29) that the court of appeals' decision conflicts in this regard with decisions of the Ninth Circuit, which supposedly hold that "when Bands receive damages from the ICC for all inadequacies in the cession of Indian title, the Bands were paid for any hunting or fishing rights." But they cite no Ninth Circuit case that even states that purported rule, much less that applies it in circumstances akin to those here.[8] To the contrary, the Ninth Circuit appears to agree that, where a Tribe has ceded title to certain lands while reserving the right to use those lands for certain purposes, an ICC award of additional compensation for those lands does not automatically extinguish the Tribe's reserved rights. See, *e.g.*, *Swim* v. *Bergland*, 696 F.2d 712, 718 (9th Cir. 1983) (where Tribes ceded lands to United States while reserving grazing rights on those lands, and Tribe later sought additional compensation for those lands in ICC, court declined to construe general language of ICC settlement as encompassing Tribe's grazing rights).

5. The counties present a final question (County Pet. i) as to "[w]hether a federal court may decline to apply this Court's 'moderate living' doctrine," citing *Fishing Vessel*, *supra*. As the court of appeals explained (Pet. App. 67), however, this Court imposed

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[8] The landowners cite *United States* v. *Dann*, 873 F.2d 1189 (9th Cir.), cert. denied, 493 U.S. 890 (1989), and *United States* v. *Pend Oreille County P.U.D. No. 1*, 926 F.2d 1502, 1508 (9th Cir.), cert. denied, 502 U.S. 956 (1991), neither of which addressed treaty-reserved usufructuary rights. The landowners' two remaining cases involve usufructuary rights but do not state the rule asserted. In *Western Shoshone National Council* v. *Molini*, 951 F.2d 200, 202-203 (9th Cir. 1991), cert. denied, 506 U.S. 822 (1992), the court held that an ICC award constituted compensation for all rights under the treaty at issue, because no treaty had granted the rights claimed. The court specifically distinguished the 1837 Treaty at issue here, which explicitly reserved hunting, fishing, and gathering rights. *Id.* at 203 (citing *Lac Courte Oreilles Band*, 700 F.2d at 355-358). Finally, in *Wahkiakum Band* v. *Bateman*, 655 F.2d 176 (9th Cir. 1981), an unratified treaty was found not to have protected the asserted aboriginal fishing rights, which were held extinguished by a 1912 statute. No ICC proceedings were at issue.

restrictions on the Tribes' treaty-based fishing rights in *Fishing Vessel* only after concluding that a "resource [*i.e.*, fish] has now become scarce." 443 U.S. at 669. In contrast, the court of appeals determined (Pet. App. 65), as a matter of fact, that "no danger of depletion of resources" exists here, because those resources are adequately protected under the Conservation Code and Management Plan entered into between the State and the Chippewa. The court of appeals therefore determined that no need existed, as in *Fishing Vessel*, for a judicial allocation of resources between Indian and non-Indian users. Accordingly, because this case does not arise in the same context of "scarce natural resources" (443 U.S. at 685) as did *Fishing Vessel*, the two cases do not conflict. Nor have the counties demonstrated any other legal error in this aspect of the court of appeals' decision.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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In The

# Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA, *et al.*,
*Petitioners,*

-and-

COUNTY OF AITKIN, *et al.*,
*Petitioners,*

-and-

JOHN W. THOMPSON, *et al.*,
*Petitioners,*

*vs.*

MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*,
and UNITED STATES OF AMERICA,
*Respondents.*

*On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

# BRIEF OF RESPONDENTS, MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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This brief opposes Petitions for Certiorari filed by the State of Minnesota (No. 97-1337) and certain Minnesota Counties (No. 97-1356) and Landowners (No. 97-1357). Respondents include two Minnesota Chippewa Bands (Mille Lacs and Fond du Lac) and six Wisconsin Chippewa Bands (Bad River, Lac Courte Oreilles, Lac du Flambeau, Mole Lake, Red Cliff and St. Croix), who were parties to the Treaty of July 29, 1837 (App. 484-89). The United States is also a respondent and is filing a separate opposition brief.

## STATEMENT OF THE CASE

### A. Background.

In the 1837 Treaty the Chippewa ceded land to the United States in present-day Wisconsin and Minnesota. App. 484. The United States promised, however, that the Chippewa could continue to hunt, fish and gather on the ceded lands. This promise is expressly stated in Article 5 of the Treaty (App. 486), which provides:

> The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States.

As we show below, these rights remain in force to this day.

In 1983, in a case involving the Wisconsin part of the cession, the Seventh Circuit held that the rights secured by Article 5 continue to exist, and this Court denied certiorari. *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983). On remand, the Western District of Wisconsin defined the nature and scope of the rights, as well as the scope of state authority to regulate their exercise. *See* App. 22 n.19 (subsequent history of *Lac Courte Oreilles*). The Court entered final judgment in 1991, *Lac Courte Oreilles Band v. Wisconsin*, 775 F. Supp. 321 (W.D. Wis. 1991), and no party appealed.

The Chippewa have exercised their Article 5 rights in Wisconsin since the mid-1980s under the *Lac Courte Oreilles* decisions. The United States, the Bands and the State of Wisconsin have worked cooperatively to ensure effective harvest regulation and natural resource protection. For its part, the United States has *inter alia* provided annual appropriations to help fund tribal programs involving "off-reservation fish, wildlife, and gathering resources to which Indian treaty rights were reaffirmed in *Lac Courte Oreilles* and related cases,"[1] and promulgated annual Federal wildlife regulations that accommodate off-reservation hunting rights under the 1837 Treaty.[2]

## B. District Court Proceedings.

The Mille Lacs Band commenced this case and the United States intervened to prevent Minnesota officials from interfering with the Band's exercise of its 1837 Treaty rights in the smaller, Minnesota portion of the 1837 cession.[3] Following *Lac Courte Oreilles*, the District Court held that the rights guaranteed in Article 5 continue to exist. App. 350. Also consistent with *Lac Courte Oreilles*, it held the rights can be exercised only on public lands[4] and those private lands that are open to public hunting and fishing by operation of state law. App. 337-38.[5] Applying well-established law, including *Lac Courte Oreilles,*[6] the District Court held the State can regulate the exercise of the treaty right, but only to the extent necessary for conservation of the resources, public health or public safety. App. 344-45. The Wisconsin Bands intervened, and the Court applied these holdings to them, App. 210, and, in a separate case, to the Fond du Lac Band. App. 478.

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[1] *E.g.*, U.S. Dept. of the Interior Budget Justifications, F.Y. 1998 at pp. BIA 111-12; F.Y. 1997 at pp. BIA 99-100; F.Y. 1996 at pp. BIA 113-14. Notably, the appropriations are directed toward implementing the Chippewa's rights in the Minnesota as well as the Wisconsin part of the 1837 ceded territory. *Id.*

[2] *See, e.g.*, 62 Fed. Reg. 46420, 46422-23 (Sept. 2, 1997); 61 Fed. Reg. 46352, 46355 (Aug. 30, 1996); 57 Fed. Reg. 35446, 35450 (Aug. 7, 1992). The regulations likewise cover the Minnesota as well as the Wisconsin part of the ceded territory. *Id.*

[3] Approximately 25 percent of the 1837 ceded territory is in Minnesota. *See* note 4 below.

Following the District Court's "Phase I" decision, the Bands prepared a conservation code and management plans to regulate harvest activities by their members in the Minnesota ceded territory. In good faith negotiations with the State defendants,[7] the Bands agreed to make many changes in these documents and coordinate harvest management and resource assessment with the State. The State defendants agreed that, in light of the revised Band code, management plans and protocols, there was no conservation, public health or safety need to apply most State conservation laws to Band members. App. 79-82.

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[4] 4. Out of approximately 3 million land acres in the Minnesota ceded territory, there are less than 440,000 acres of public lands on which Band members might be able to exercise their rights. Supp. Aff. of J. H. Gilbert at 3 (9-11-96). These figures should be contrasted with the Counties' (Pet. 3) and Landowners' (Pet. 21 n.28) erroneous figures of 13 million and 6.5 million acres, respectively.

[5] 5. The District Court later held that only private lands enrolled in Minnesota's tree growth tax program satisfy this requirement. App. 104-12. There are few, if any, such lands in the Minnesota ceded territory. Supp. Gilbert Aff. at 3-4.

[6] 6. *E.g. Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 682 & n.25 (1979); *Antoine v. Washington*, 420 U.S. 194, 207-08 (1975); *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 & 401 n.14 (1968); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *United States v. Oregon*, 718 F.2d 299, 305 (9th Cir. 1983); *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981); *Lac Courte Oreilles Band v. Wisconsin*, 668 F. Supp. 1233, 1238-42 (W.D. Wis. 1987).

[7] 7. Contrary to the Counties' (Pet. 28) and Landowners' (Pet. 23 n.31) claims, no order compelled the State defendants to negotiate.

The District Court denied defendants' request to further restrict Band harvests, because no showing was made that Band harvests would interfere with the rights of non-Band members. App. 138. It preserved defendants' right to seek an allocation of resources upon a proper showing in the future. App. 152, 163.

### C. The Eighth Circuit's Decision.

The State defendants, Counties and Landowners appealed, alleging that the Bands' rights were extinguished or their claims otherwise barred on multiple grounds. *See* App. 16-70. The Bands cross-appealed, challenging the District Court's limitation of the lands on which they could exercise their rights. App. 70-72. The Eighth Circuit affirmed in all respects. App. 72.

The State (Pet. i) presents three questions here: whether the Bands' 1837 Treaty rights were extinguished by either: (1) an 1850 Executive Order; (2) an 1855 Treaty; or (3) the 1858 Minnesota Admission Act. We limit our description of the Eighth Circuit's opinion to these issues.[8]

*1. The 1850 Executive Order.* The 1850 Order purported to revoke the Chippewa's hunting, fishing and gathering rights and to order them to remove from the ceded territory. App. 21. Applying *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and its progeny,[9] the Eighth Circuit held that the President had no authority unilaterally to order the removal of Indian people, and in purporting to do so violated the requirement in the 1830 Removal Act that the Indians consent to removal. App. 23-26. The Court noted that the "defendants do not cite to any evidence indicating that the President was authorized to remove the Bands without their consent." App. 25. Because it was "clear . . . that the Bands in this litigation did not give consent for removal," the Court concluded that "President Taylor had no authority for his 1850 Executive Order of removal." App. 26-27.

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[8] Other aspects of the opinion are either not embraced within any of the Petitions or are raised only by the Counties and Landowners. We address the additional questions they present in Section IV below.

The Court then considered whether "the portion of the Order extinguishing the 1837 usufructuary rights is separate and severable from the portion of the Order requiring removal." App. 27. Using the test articulated in *Champlin Ref. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932), and applied in *New York v. United States*, 505 U.S. 144, 186 (1992), and *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987), App. 27-28, the Court held that the revocation portion of the Order cannot be severed from the directive to remove. App. 29. It noted that the purpose of the Order was to mandate removal, this purpose was integral to the entire Order, all of the historical evidence surrounding the Order related to removal, and there is no evidence that revocation of usufructuary rights would have been made independently of the removal mandate.

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[9] *See Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) ("when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb,' and the Court can sustain his actions 'only by disabling the Congress from acting upon the subject' ") (quoting *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring)); *Cole v. Young*, 351 U.S. 536, 557 & n.20 (1956) (when the President rests his action on statutory authority, "the validity of the action must be determined solely by the congressional limitations which the President sought to respect"). *See also United States v. Santa Fe Pacific RR Co.*, 314 U.S. 339, 355-56 (1941) (forcible removal of Walapais Indians to a reservation was "not pursuant to any mandate of Congress" and therefore "unauthorized" and of no legal effect).

App. 29-31.[10] Accordingly, it held the entire 1850 Order invalid. App. 31.[11]

2. *The 1855 Treaty.* The Court also rejected the argument that the 1837 usufructuary rights were terminated by the Treaty of February 22, 1855 (App. 502-14). Of the eight Bands in this case, only the Mille Lacs Band, but not the Fond du Lac or the six Wisconsin Bands, was a party to the 1855 Treaty. The 1855 signatory Bands ceded additional lands in north-central Minnesota and relinquished "all right, title, and interest" to any other lands. App. 502-03; *see* App. 35.

The Eighth Circuit analyzed the 1855 Treaty "in its historical context to determine whether the parties meant it to revoke usufructuary rights." App. 36. It considered both the understanding of the Indians[12] and the Government, and found that neither "intended or understood the treaty to work such a revocation." App. 36-37. It held that, "[g]iven the absence of any mention of the 1837 Treaty or its usufructuary rights in the 1855 Treaty or its negotiation process, and the lack of evidence that the parties intended to extinguish these rights," the 1855 Treaty did not revoke the Mille Lacs Band's usufructuary rights under the 1837 Treaty. App. 37-38. In so ruling, the Court carefully considered and distinguished *Oregon Dept of Fish & Wildlife v. Klamath Indian Tribe,* 473 U.S. 753 (1985). App. 38-39.

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[10] The District Court found that "the only reason that the 1850 executive order included language extinguishing the hunting, fishing, and gathering privilege was to facilitate removal of the Chippewa to benefit the Minnesota economy." App. 310. It also found that an order of revocation without removal would have been inimical to the purposes of the Order "because it would have halted useful trade in furs and other natural resources by the Chippewa without other benefit in return." *Id.* And, it considered and rejected the Landowners' argument (Pet. 7-8, 18-19) that the President would have revoked the Chippewa's usufructuary rights to clear land titles. App. 311-12.

[11] The District Court held that the Order had no present effect on the Chippewa's treaty rights on several alternative grounds as well. It held that even if the Order could be severed, the President did not have unfettered discretion to revoke the Chippewa's rights under the treaty given the statutory duty of good faith imposed by the Northwest Ordinance, the Government's trust responsibility to Indian tribes, its explicit promises of just treatment during the treaty negotiations, and the Chippewa's understanding that their rights would be protected by the President. App. 313-15. The District Court (like the Seventh Circuit in *Lac Courte Oreilles*) held that the Order violated these duties, App. 315-16, and, in any event, was repealed by subsequent orders and treaties. App. 319-21. The Eighth Circuit did not consider these alternative grounds for decision. App. 31, n.25.

*3. Equal Footing.* The Court also rejected the argument that the 1837 rights were repealed by implication upon Minnesota's admission to the Union. It followed the analytical framework in *Crow Tribe v. Repsis,* 73 F.2d 982 (10th Cir. 1995), *cert. denied,* 116 U.S. 1851 (1996), App. 52-55, but found that the Bands' rights in this case were not "temporary and precarious" in the sense those terms were used in *Repsis*, and therefore survived statehood. App. 55. Applying settled law, the Court also found that the Bands' rights here "are not irreconcilable with the State's sovereignty," App. 56-58, and noted that "defendants have presented no evidence surrounding the legislation admitting Minnesota into the Union from which we could conclude that Congress intended to abrogate the 1837 Treaty rights." App. 59.

## REASONS FOR DENYING THE WRIT

The decision below confirms the continued existence of the Chippewa's rights to hunt, fish and gather pursuant to the 1837 Treaty in the smaller, Minnesota portion of the 1837 ceded territory. These are the same rights confirmed by the Seventh Circuit fifteen years ago in the Wisconsin portion of the ceded territory. This Court declined to review the Seventh Circuit's decision then, and review is even less appropriate today. The issues have been settled with finality in Wisconsin for years, and the rights have been responsibly exercised by the Chippewa and actively supported by the United States. Moreover, the Eighth Circuit's decision does not conflict with decisions of other Circuit Courts or this Court and, because it is based on unique historical facts concerning the 1837 Treaty, 1850 Order and 1855 Treaty, does not present issues of general applicability. More specifically:

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[12] *See Passenger Fishing Vessel,* 443 U.S. at 676 ("treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians").

1. The controversy over the 1850 Order involves a single executive order with no significance outside this case and *Lac Courte Oreilles*. Both Circuits held the 1850 Order ineffective, as did the Wisconsin Supreme Court in 1972.[13] In reaching that result here, the Eighth Circuit correctly stated and applied the controlling law. Petitioners do not challenge the Eighth Circuit's conclusion that the President lacked authority to order removal and do not challenge the severability test it employed. Indeed, the only aspect of its holding regarding the 1850 Order that is challenged here is its *application* of the severability test. This narrow, fact-based challenge does not warrant certiorari.

2. The 1855 Treaty affects, at most, only one of the eight Bands. The Eighth Circuit applied well-established principles of treaty interpretation in holding that the 1855 Treaty did not revoke the Mille Lacs Band's hunting and fishing rights under the 1837 Treaty. Its decision discusses and distinguishes *Klamath*, where this Court held that hunting and fishing rights that were clearly tied to reservation lands were ceded when those reservation lands were ceded. In this case, the Chippewa's rights were expressly severed from the land when the land was ceded in 1837. The 1855 Treaty, which was intended to extinguish Indian land claims, did not affect these separate, treaty-secured hunting and fishing rights.

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[13] 13. *State v. Gurnoe*, 53 Wis. 2d 390, 405-07, 192 N.W. 2d 892, 899-900 (1972).

3. Nor is there any conflict among the Circuits regarding the equal footing doctrine and treaty secured usufructuary rights. The Eighth Circuit utilized the analytical framework set forth by the Tenth Circuit in *Repsis*, and correctly concluded that the treaty right at issue here was intended to survive statehood. Its ruling falls squarely within this Court's precedents, which confirm that treaty rights, even those subject to a power of revocation, are *not* impliedly repealed by statehood under the equal footing doctrine.

## I. THE 1850 EXECUTIVE ORDER

### A. The Eighth Circuit's Decision Does Not Conflict with This Court's Decisions.

Petitioners argue that the Eighth Circuit's holding that the 1850 Order was invalid conflicts with this Court's precedents concerning treaty interpretation and review of Executive Orders. *E.g.* St. Pet. 20-23; Co. Pet. 11-15; Ld. Pet. 14-15, 17-20. However, Petitioners do not confront the Eighth Circuit's analysis, which shows that the President had no authority to order the Chippewa to remove, and that the Order's removal and revocation clauses could not be severed. Petitioners fail to show that this analysis conflicts with any ruling of this Court, or that there was any error in the predicate findings on which it was based.

Significantly, Petitioners do not challenge the Eighth Circuit's holdings that the President had no authority to order removal unilaterally, and that Indian consent to removal was required by Congress in the 1830 Removal Act. App. 24-25. Further, Petitioners do not challenge the Eighth Circuit's holding that the Chippewa did not consent to remove in this case, identifying no treaty provision which provides such consent. And, Petitioners do not challenge the Court's conclusion that, because there was no authority for the directive to remove, it was unlawful.[14]

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[14] To the extent the Counties argue that even Presidential orders that lack authority and conflict with Congressional directives must be

(Cont'd)

This leaves only the Eighth Circuit's determination that the Order cannot be severed. Only the State addresses severability, and it agrees (Pet. 23) that the Eighth Circuit "appropriately cite[d] the test for severing an executive order." It argues only that the Court improperly applied this test. Pet. 23-24. While no such error was made,[15] the "misapplication of a properly stated rule of law" is in any event rarely grounds for a writ of certiorari. Sup. Ct. R. 10. The Court should not make an exception in this case. The 1850 Order has no continuing significance outside the issues presented here and in the *Lac Courte Oreilles* litigation. The Seventh and Eighth Circuits (the only Circuits with jurisdiction over the lands ceded in 1837) agree that the Order did not revoke the Chippewa's usufructuary rights. In the absence of any conflict between the Circuits, there is no need for this Court to review the application

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(Cont'd)

enforced by the Courts (Pet. 11-15), their argument is clearly foreclosed by *Youngstown*. App. 23, n.20; *see also Santa Fe*, 314 U.S. at 355-56. Notably, the Counties make no attempt to apply either their analysis or the cases they cite to the Eighth Circuit's holding regarding removal. For example, in *Dalton v. Spector*, 511 U.S. 462, 476 (1994), the Court interpreted an Act of Congress to confer unfettered discretion on the President to approve or disapprove a base closing recommendation. The Eighth Circuit found no such authority for removal in this case, and the Counties cite none.

[15] The State's argument on the merits disregards the District Court's findings regarding the purpose of the Order and the Eighth Circuit's discussion of them. *See* note 10 and accompanying text above. Instead, it argues that, on its face, the Order had two objectives — revocation of usufructuary rights and removal. But the State cites no evidence of an intent to revoke the Chippewa's hunting and fishing rights absent removal. Notably, the Territorial Resolution it cites was entitled "a joint resolution related to the *removal* of the Chippewa Indians from the ceded lands within the Territory of Minnesota," and did not seek revocation of usufructuary rights absent removal. App. 566-67 (emphasis added).

of correctly stated principles of severability to the singular, 150-year old facts of this case.

### B. The Issue Petitioners Raise Was Not Decided by the Eighth Circuit.

The issue pressed most strenuously by Petitioners — the scope of the President's authority under Article 5 of the 1837 Treaty — was not addressed by the Eighth Circuit. *See* App. 31 n.25 (declining to address standard for presidential action). Petitioners argue that Article 5 should be read to confer unfettered discretion on the President to revoke the Chippewa's rights at any time and for any reason. St. Pet. 21-22; Co. Pet. 13-14; Ld. Pet. 17-18. The District Court disagreed, holding on multiple grounds that the President did not have unfettered discretion, *see* App. 312-15 and note 11 above, but the Eighth Circuit's decision "obviates any need to consider" this issue. App. 31 n.25.[16] There can be no conflict between the Eighth Circuit's decision and Supreme Court precedent with respect to an issue not decided by the Circuit. Furthermore, certiorari is not appropriate to decide an issue the Circuit Court did not reach, especially where, as here, the grounds on which it did rely are dispositive and largely unchallenged.

### C. The Questions Presented Do Not Warrant Review in Light of the District Court's Alternative Holding that the Order Was Repealed.

Although the Eighth Circuit did not reach the issue, the District Court also held that the 1850 Order was repealed. App. 319-21.

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[16] The State's assertion (Pet. 22) that the Eighth Circuit essentially read the phrase "during the pleasure of the President" out of the Treaty is wrong; the Court did not need to and therefore did not address the meaning of that phrase. Likewise, the Landowners' claim (Pet. 18) that the Court "dismissed the idea that the President could revoke the privilege without ordering removal" mischaracterizes the Court's decision; it did not address this "idea" because President Taylor did *not* revoke the privilege without ordering removal.

The Wisconsin Supreme Court reached the same conclusion in upholding Chippewa fishing rights in 1972.[17]

The District Court's conclusion was based on a careful analysis of a detailed historical record, the material parts of which were relied upon by the Eighth Circuit as well. App. 30, n.24. Minnesota officials sought the Order for economic reasons, to bring Chippewa from Wisconsin to Minnesota, so that the new Territory would benefit from sizable annuity payments and Indian agency operations. App. 251-53, 267. When removal efforts caused hundreds of Chippewa deaths from starvation and disease, App. 256-59, the United States suspended removal operations and did not reinstate them. App. 259-64; *see also* App. 30, n.24. Instead, it allowed the Chippewa to remain on ceded land, App. 264-66, gave them equipment to hunt and trap there, *id.*, and established reservations for them there in 1854 and 1855 treaties. App. 266-67, 274, 283. In 1855 government officials recognized the Bands' continued rights to hunt and fish on ceded lands under the 1837 Treaty. App. 269-71; *see also* App. 30, n.24.

There is no record of any reference to the 1850 Order for more than 70 years thereafter. App. 300.[18] Although the Order was invoked by federal officials in the 1930s to assert that the Chippewa's usufructuary rights had been revoked, there is no evidence that these officers considered the historical circumstances or made any determination regarding the validity or repeal of the

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[17] *Gurnoe*, 53 Wis. 2d at 405-07, 192 N.W. 2d at 899-900.

[18] This Court issued three opinions indicating that no removal order had been issued. *United States v. J.S. Stearns Lumber Co.*, 245 U.S. 436, 437 (1918); *Wisconsin v. Hitchcock*, 201 U.S. 202, 213-14 (1906); *United States v. Thomas*, 151 U.S. 577, 582 (1894). In 1897 the United States Attorney argued that the Chippewa retained rights to hunt and fish under the 1837 Treaty, and the Minnesota Attorney General agreed. App. 326-27 & n.21. In 1925 the Bureau of Indian Affairs stated that there was "[n]o record" that the usufructuary rights reserved in the 1837 Treaty had been abrogated. App. 327.

Order. App. 300.[19] When the Executive Branch did so, it asserted repeatedly that the Order had no effect on the Chippewa's pre-existing rights.[20] The United States' position in this case is only the latest manifestation of what is now clear Federal policy that the Chippewa's 1837 rights remain in force. *See, e.g.*, notes 1 & 2 and accompanying text above.

The District Court held that the 1850 Order was repealed because the provisions of the 1854 and 1855 treaties were "completely contrary to the 1850 order" and "the executive branch intended to repeal" the order. App. 320-21 (citing, *e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153-54 (1976)). Given the District Court's and the Wisconsin Supreme Court's holding that the Order was repealed, the detailed factual findings supporting that holding, and clear Federal policy affirming the Chippewa's rights, Petitioners' arguments regarding the validity of the Order before its repeal do not justify review by this Court.

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[19] The Counties (Pet. 19-21) and Landowners (Pet. 10-11, 20) also cite statements from the late 19th and early 20th centuries that the State could regulate Chippewa hunting and fishing. However, the extent of State authority to regulate treaty hunting and fishing rights was an open question until this Court's 1942 decision in *Tulee v. Washington*, 315 U.S. at 684-85. These pre-*Tulee* assertions of state regulatory authority thus have no bearing on the existence of the right. *See also* App. 297-98.

[20] The United States advanced this position in 1954 in Court of Claims litigation involving Chippewa occupancy rights, App. 386, in 1983 in the *Lac Courte Oreilles* litigation, *see* United States' Motion to Dismiss and Affirm at 7, 12-13, *Besadny v. Lac Courte Oreilles Band*, 464 U.S. 805 (1983) (No. 83-6), and in this case.

## II. THE 1855 TREATY

### A. Factual Background.

The Government negotiated treaties with the Fond du Lac and Wisconsin Bands in September 1854 and the Mille Lacs and other Minnesota Bands in February 1855. App. 31-32, 34-35. "The evidence is overwhelming that neither party intended the 1854 Treaty to disturb usufructuary rights," App. 34, and no party challenges that holding here.

Article 1 of the 1855 Treaty cedes a ten million acre tract north and northwest of the 1837 cession. App. 35. It also states: "And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." App. 35.[21] The 1855 Treaty does not mention usufructuary rights, and the rights guaranteed in the 1837 Treaty were not mentioned in the treaty negotiations. App. 35. However, contemporaneous with those negotiations, government officials, including the Minnesota Territorial Governor and *ex officio* Superintendent of Indian Affairs, acknowledged the continued existence of the Bands' usufructuary rights under the 1837 Treaty. *See* App. 269-71.

During the 1855 Treaty negotiations, Chippewa representatives expressed their understanding that the Government's purpose was to purchase land, and that the Chippewa would continue to hunt, fish and gather after the Treaty was concluded. App. 36. The United States drafted treaty provisions revoking usufructuary rights in other cases, but did not do so here. App. 36-37. The authorizing act for the 1855 Treaty showed that the United States was concerned about the extinguishment of land title, not usufructuary rights. App. 37.[22]

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[21] The District Court found that the Government included this provision in the 1855 treaty to extinguish land claims of certain signatory Bands in northern Minnesota that were not included in the ten million acre tract. App. 286-88. The Government used broad language because it was not certain about the nature and scope of these land claims. App. 288. The District Court also found that the most likely Chippewa translation of this provision would have indicated that the Chippewa were transferring their remaining lands to the United States, but would not have conveyed any sense that they were relinquishing their hunting, fishing and gathering privilege under the 1837 Treaty. App. 284, 324-25.

### B. Because Only One of the Eight Bands in This Case Was a Party to the 1855 Treaty, the Question Whether the 1855 Treaty Revoked That Band's Usufructuary Rights Does Not Fundamentally Affect the Outcome of The Case.

Of the eight Bands in this case, only the Mille Lacs Band was a party to the 1855 Treaty. The Fond du Lac Band and the six Wisconsin Bands were instead parties to the 1854 Treaty. None of the Petitions before this Court seeks review of the Eighth Circuit's holding (App. 31-34) that the 1854 Treaty preserved the Bands' 1837 treaty rights. Thus, even if the Court were to determine that the 1855 Treaty revoked the rights of the Mille Lacs Band, the other seven Bands would retain their usufructuary rights in the Minnesota ceded territory. Since such a determination would not fundamentally alter the outcome of the case, certiorari is inappropriate.

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[22] The District Court found that the retention of hunting and fishing rights was consistent with Federal policy, and that the terms of the Treaty and the negotiations indicate that both parties expected the Chippewa to continue to hunt and fish on ceded lands. App. 289-90. Had the Government sought to terminate 1837 usufructuary rights, it would have done so in the *1854* Treaty, when most of the Bands holding those rights were present, but it did not. App. 288-89. *See also Johnson v. Gearlds,* 234 U.S. 422, 438 (1914) (provision in the 1855 Treaty barring the sale of liquor on ceded lands "evidently contemplated that the bands of Indians, while making their permanent homes within the reservations, *would be at liberty to roam and to hunt throughout the entire country, as before*") (emphasis added).

### C. The Eighth Circuit's Decision Is Consistent with *Klamath.*

The Eighth Circuit applied the principles of treaty interpretation articulated in *Klamath*, but found that the rights at issue here were materially different than those at issue in *Klamath* and were not terminated by the 1855 Treaty. It explained:

> The 1864 Treaty rights in *Klamath* were exclusive and *on-reservation* rights, and thus logically extinguished with a relinquishment of a portion of the reservation. The rights at issue in this litigation are *non-exclusive* and *off-reservation* rights, reserved in a treaty not mentioned in the 1855 Treaty or its negotiations. The situations are not analogous and do not compel the same outcome.

App. 39. This conclusion is sound and does not warrant certiorari.

In *Klamath* an 1864 treaty created a reservation and secured "the *exclusive* right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits." 473 U.S. at 755 (emphasis added). The treaty did not provide for off-reservation rights. *Id.* at 755. Due to a surveying error, a large tract was excluded from the reservation. *Id.* at 755-56. In 1901, the Tribe ceded "all [its] claim, right, title and interest in and to" the excluded land. *Id.* at 760.

This Court conducted a "[c]areful examination of the entire record" to determine the intent of the parties. *Id.* at 774. The most important factor was that the 1864 treaty rights were "plainly . . . intended to be exercised within the limits of the reservation." *Id.* at 766-68. Because the rights were tied to reservation land, they were terminated when reservation land was ceded. *Id.* at 769-70. The Court distinguished treaties and agreements under which Indians "enjoy special hunting and fishing rights that are independent of any ownership of land." *Id.* at 765-66 & n.17. Cases interpreting such rights shed no light on the case before it, which involved the "precedent question whether *any* off-reservation rights were intended to be reserved at all." *Id.* at 769, n.20 (emphasis added).

Petitioners read *Klamath* to hold treaty language ceding "all claim, right, title, and interest in and to" land extinguishes hunting and fishing rights as a matter of law. St. Pet. 20; Co. Pet. 17; Ld. Pet. 20-21. However, the Court did not construe the language in the abstract; it held the treaty had to be interpreted "in the entirety of its particular historical context," and its language given a "fair appraisal" based on "the entire record." 473 U.S. at 773 n.23 & 774.[23] The most important factor in *Klamath* — that the rights were tied to and could not exist independently of the reservation — is not present here, where a privilege of hunting and fishing was guaranteed on *ceded* lands in 1837. Indeed, the *Klamath* Court recognized that treaty rights such as those at issue in this case are "independent of any ownership of land" and are distinguishable from those at issue in *Klamath*. It did not hold that such "independent" treaty rights are extinguished as a matter of law by language ceding interests in land.

As required by *Klamath*, the Eighth Circuit analyzed the 1855 Treaty "in its historical context to determine whether the parties meant it to revoke usufructuary rights." App. 36. Although the Court's application of the *Klamath* test to the fundamentally different rights and very different historical context in this case led to a different result, that does not establish a conflict with *Klamath.*[24]

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[23] *Cf. South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 799 (1998) (rejecting "literal construction" of savings clause in favor of "sensible construction" that avoids an "absurd conclusion" and gives effect to intentions of parties). In this case, the lower courts' interpretation avoided the "absurd conclusion" that the 1855 Treaty revoked the Mille Lacs Band's hunting and fishing rights when, only five months earlier, the 1854 Treaty preserved the same rights for the Fond du Lac and Wisconsin Bands. Instead, the lower courts' "sensible construction" gave the cession provision precisely the effect the Government intended it to have. *See* App. 327-28; note 21 above.

The treaty history here is unique: a treaty explicitly reserving a hunting and fishing right on one tract of ceded land was followed by another treaty ceding a different tract of land and releasing all other land claims. Petitioners identify no similar situation involving any other Tribe, and such facts are unlikely to arise in another case. Certiorari to review the Eighth Circuit's application of well-established principles of law to these case-specific circumstances is inappropriate.

## III. THE EQUAL FOOTING DOCTRINE

Citing *Repsis,* the State asserts (Pet. 10-11) there is a conflict between the Eighth and Tenth Circuits over whether treaty rights that are "temporary" in nature are extinguished under the equal footing doctrine. There is no such conflict. First, the Eighth Circuit here and Tenth Circuit in *Repsis* undertook the same analysis, determining the nature of the right first, and then considering whether the right had survived statehood. *Cf.* App. 55-58 *with Repsis*, 73 F.3d at 988. That a different result was reached by the Eighth Circuit, under a different treaty, with a different historical context, does not create a conflict between the Circuits. Second, the State's contention that Article 5 of the 1837 Treaty was extinguished by the equal footing doctrine is foreclosed by no less than four decisions of this Court, which establish that even a treaty right that is subject to later revocation by the United States is not invalidated by the equal footing doctrine.

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[24] The Counties (Pet. 16) and Landowners (Pet. 20) also allege a conflict with *Red Lake Band v. Minnesota,* 614 F.2d 1161 (8th Cir.), *cert. denied,* 449 U.S. 905 (1980). Although an intra-circuit conflict is not an appropriate basis for certiorari, we note that there is no such conflict. *Red Lake* affirmed the decision in *United States v. Minnesota,* 466 F. Supp. 1382 (D. Minn 1979), which, like *Klamath,* involved rights that were "mere incidents of Indian title, not rights separate from Indian title." *Id.* at 1385.

### A. There Is No Conflict Among the Circuits.

The treaty provision at issue in *Repsis,* set forth in Article 4 of the 1868 Crow Treaty, was identical to that contained in Article 4 of the 1868 Shoshoni-Bannock Treaty, which was before the Court in *Ward v. Race Horse*, 163 U.S. 504 (1896). In *Ward*, the Court held that the right embraced only "unoccupied" lands of the United States, and only until the United States transferred title to such lands. 163 U.S. at 509-10. Such a right, the Court held, was "temporary and precarious" and therefore not intended to survive statehood. *Id.* at 510-16. The *Repsis* court, construing identical treaty language, adopted *Ward's* interpretation of that language. Both *Ward*, 163 U.S. at 515, and *Repsis*, 73 F.3d at 991, recognized that a right that was "continuing" in nature would *not* be impliedly repealed under the equal footing doctrine.

The Eighth Circuit recognized and applied this distinction. App. 53-55. However, considering the District Court's comprehensive historical analysis, the Eighth Circuit distinguished the rights at issue in *Ward* and *Repsis* from the rights reserved in Article 5 of the 1837 Chippewa Treaty. App. 55 (citing App. 188, 453-54). The latter are *not* limited to "unoccupied" lands and are *not* dependent on the United States retaining title to particular parcels of land, *id.*, but were intended to "guarantee[ ] the Bands the right to continue their way of life through hunting, fishing and gathering." App. 150. Accordingly, they are not temporary and precarious within the meaning of *Repsis*, "but instead were intended to be continuing rights." App. 55.[25]

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[25] The State asserts (Pet. 12) that the Eighth Circuit "deviated from the framework established in *Ward* and *Repsis* by asserting that the equal footing doctrine only applies to rights which are tied to ownership of the land." This is a misreading of the Eighth Circuit's opinion, which recognized the distinction between "temporary and precarious" rights and "continuing" rights. The Court simply noted that it was the dependency of the rights at issue in *Ward* and *Repsis* on the lands remaining both "unoccupied" *and* in the ownership of the United States that established their "temporary and precarious" nature.

The State argues (Pet. 13-14) that because Article 5 permits the President to revoke the right, it is not "continuing" in nature. However, as the Eighth Circuit held, "the fact that the rights could be revoked by the President, or abrogated by Congress like any other treaty right, does not deprive them of their 'continuing' nature." App. 55-56 n.42. Thus, under *Repsis*, there is no basis for finding they do not survive statehood.

### B. Supreme Court Decisions Confirm that the Eighth Circuit's Decision Was Correct.

The correctness of the Eighth Circuit's holding is firmly established by this Court's decisions, which hold that a treaty right, even one which the United States reserves the power to later revoke, is *not* invalidated by the equal footing doctrine. For example, in *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 193 (1876), the Court held that the Constitution authorized a post-statehood treaty extending the federal liquor laws to ceded lands "until otherwise directed by Congress or the President of the United States." The Court rejected the claim that this provision violated the equal footing doctrine, holding that it was authorized by the Federal Government's power to treat with Indian tribes. *Id.* at 197.[26] In *Johnson v. Gearlds*, 234 U.S. 422 (1914), a *pre-statehood* treaty was challenged on the same grounds. The Court unanimously reversed the District Court's holding that Article 7 of the 1855 Treaty, which barred the introduction of liquor into lands that had been ceded by the Treaty "until otherwise provided by Congress," was repealed by the Minnesota enabling and admitting acts. The Court held:

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[26] The Court subsequently held that the Federal Government has the power to reserve hunting and fishing rights in *pre-statehood* Indian treaties, and that such rights are not repealed upon the admission of a state into the Union. *United States v. Winans*, 198 U.S. 371, 382 (1905). The Court has reconciled such rights with State regulatory authority in a long series of cases. *See* App. 56-58; *see also* note 6 above.

> [I]f the making of such a treaty after the admission of the state is not inconsistent with the "equal footing" of that state with the others, — as, of course, it is not, — it seems to us to result that there is nothing in the effect of "equal footing" clauses to operate as an implied repeal of such a treaty when previously established.

*Id.* at 439. The power of the United States to enact the treaty provision, the Court confirmed, was "thoroughly established." *Id.* at 438-39.[27]

These cases confirm that rights such as those at issue here are not impliedly repealed under the equal footing doctrine, and that the Eighth Circuit correctly distinguished such rights from those at issue in *Ward* and *Repsis*. In any event, the Eighth Circuit's analysis gives full credence to *Repsis* and presents no conflict warranting certiorari.

## IV. ISSUES NOT RAISED BY THE STATE[28]

### A. Indian Claims Commission.

The Landowners allege (Pet. 24-30) that there is a conflict among the Circuits over the question whether an Indian Claims Commission (ICC) award for the value of ceded land extinguishes hunting and fishing rights. The Eighth Circuit's careful analysis of this issue (App. 48-51) shows there is no such conflict.[29] The Court held that where a treaty explicitly reserves usufructuary rights on ceded land — such as the 1837 Treaty here — ICC silence with regard to those rights when awarding compensation for the ceded land " 'implies no determination as to those rights.' " App. 50.[30] In contrast, where a treaty is silent regarding usufructuary rights on ceded lands — such as the 1901 Agreement at issue in *Klamath* — silence by the ICC regarding those rights coupled with a payment for the land implies that the rights were " 'disposed of by the cession of the land.' " App. 50.

---

[27] The Court reached the same result in two Wisconsin cases involving Chippewa occupancy rights under Article 2 of an 1842 Treaty, which were also subject to a power of revocation. *Wisconsin v. Hitchcock*, 201 U.S. 202, 213-14 (1906); *United States v. Thomas*, 151 U.S. 577, 584 (1894).

[28] As noted above, only the Counties or Landowners raise these issues.

Other federal courts have recognized this distinction and have held that an ICC award for the value of ceded land does not bar claims based on usufructuary rights that were expressly reserved when the land was ceded.[31] There is no conflict.[32]

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[29] The Landowners' description (Pet. 26-27) of the proceedings before the ICC intermixes statements made in superseded petitions in one case involving only some of the Bands with statements made in wholly different cases, including one brought under a different jurisdictional act. For an accurate description of the proceedings, *see* App. 39-48.

[30] The ICC did not have jurisdiction to extinguish tribal rights, but only to award compensation for property acquired or rights terminated by the United States. *E.g. United States v. Dann,* 873 F.2d 1189, 1198 (9th Cir.), *cert. denied,* 493 U.S. 890 (1989).

[31] *E.g. United States v. Washington,* 135 F.3d 618, 637 (9th Cir. 1998) (reaffirming *United States v. Washington,* 459 F. Supp. 1020, 1039-42 (W.D. Wash. 1978)); *Western Shoshone Nat'l Council v. Molini,* 951 F.2d 200, 203 (9th Cir. 1991), *cert. denied,* 506 U.S. 822 (1992) (distinguishing the Chippewa's 1837 Treaty as discussed in *Lac Courte Oreilles* from the Shoshone Treaty, which did not expressly reserve usufructuary rights); *Swim v. Bergland,* 696 F.2d 712, 718 (9th Cir. 1983); *Holcomb v. Confederated Tribes of the Umatilla Indian Reservation,* 382 F.2d 1013, 1014 (9th Cir. 1967).

[32] Apart from *Molini* (*see* note 31 above), the cases cited by the Landowners (Pet. 29 n.42 & 43) do not involve usufructuary rights.

### B. Standard of Review.

The Counties assert (Pet. 23-25) that there is a conflict concerning the standard of review, citing Ninth and Tenth Circuit cases. The Ninth Circuit reviews treaties and executive orders *de novo,* but reviews findings of historical fact for clear error.[33] The Eighth Circuit did the same here. App. 27, 37-38.[34] The Tenth Circuit case cited by the Counties is distinguishable and does not establish a conflict.[35]

### C. State Regulatory Authority.

As discussed above (*see* note 6 and accompanying text), the District Court applied the "conservation necessity" standard developed by this Court to determine the permissible extent of State regulatory authority. The Eighth Circuit agreed that this was the proper standard. App. 57-58 n.43. The Landowners present three questions concerning this standard (Pet. i-ii, #3-5). First, they ask "[w]hether by virtue of the Nelson Act . . . and the General Allotment Act . . . the Chippewa were subject to state regulation for all off-reservation hunting and fishing activities." Pet. i, #3. However, they cite no provision of either Act that purports to affect such off-reservation rights, and cite no case holding that either Act affects such rights. Pet. 21.

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[33] *See United States v. Washington,* 135 F.3d at 629-30; *Confederated Tribes of Chehalis v. Washington,* 96 F.3d 334, 342-43 (9th Cir. 1996), *cert. denied,* 117 S. Ct. 1432 (1997); *United States v. Aam,* 887 F.2d 190, 194 (9th Cir. 1989).

[34] In many instances, the Eighth Circuit's independent review of the record amounted to a *de novo* examination of factual issues as well. *See* App. 26-27 ("[i]t is clear to us that the Bands . . . did not consent"), 36-37 (reviewing historical facts concerning 1855 Treaty).

[35] The Court reviewed a mixed question of law and fact *de novo* because it "primarily involve[d] the consideration of legal principles." *Pittsburgh & Midway Coal Min. Co. v. Yazzie,* 909 F.2d 1387, 1393-94 (10th Cir.), *cert. denied,* 498 U.S. 1012 (1990).

Second, the Landowners ask whether any immunity from State regulation conflicts with *Klamath,* Pet. i, #4, contending there is a distinction between a treaty "right" and a treaty "privilege". Pet. 15-16. *Klamath* does not support this distinction; the Court used the terms interchangeably in discussing the "conservation necessity" standard. *E.g.* 473 U.S. at 765 n.16, 768. Other courts have expressly rejected the distinction. *E.g. State v. Miller*, 102 Wn.2d 678, 683, 689 P.2d 81, 84 (1984).

Third, the Landowners ask whether any limitation on State regulation violates the Tenth Amendment. Pet. i-ii, #5. However, as noted above (note 26), this Court has squarely held that the Federal Government had the power to guarantee hunting and fishing rights in Indian treaties, and used the "conservation necessity" standard to reconcile such rights with State sovereignty. Where the Federal Government has power to take action, "the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States,* 505 U.S. 144, 156 (1992).

### D. Allocation.

The Counties (Pet. i #3) ask "[w]hether a federal court may decline to apply this Court's 'moderate living' doctrine . . . and order a maximum of one-half the hunting and fishing be dedicated to Indian Bands' harvest . . ." However, there is no court order allocating 50 percent of the resources to the Bands. *See* App. 60-61. The Bands' own management plans restrict Band harvests "well below" 50 percent of the available harvest. App. 130. The Eighth Circuit held that there was no present need for a further, judicial allocation because there was "no danger of depletion of resources," App. 65, nor any showing by defendants that their right to any resource has been harmed. App. 66. The Counties (Pet. 28-29) do not discuss these rulings and make no attempt to show that they conflict with any precedent of this or any other Court. Certiorari is not appropriate to review a decision that denied a request for an allocation "without prejudice." App. 163.

## CONCLUSION

The Petitions for Certiorari should be denied.

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In The

# Supreme Court of the United States

October Term, 1997

◆

STATE OF MINNESOTA, ET AL.,
*Petitioners,*
vs.
MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.,
*Respondents.*

◆

COUNTY OF AITKEN, ET AL.,
*Petitioners,*
vs.
MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.,
*Respondents.*

◆

JOHN W. THOMPSON, ET AL.,
*Petitioners,*
vs.
MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.,
*Respondents.*

◆

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Eighth Circuit**

◆

## COUNTIES' REPLY TO BRIEFS IN OPPOSITION

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# REPLY TO BRIEF IN OPPOSITION

## 1. Respondents' Removal Act Arguments Fail to Recognize the President's Constitutional and Statutory Authority.

The Respondents build a straw man arguing that the Removal Act of 1830 (4 Stat. 411) did not provide the President authority to revoke the treaty privilege.

The argument overlooks the constitutional and other statutory sources of the President's power here, including the Treaty to which the Chippewa had consented. This is especially important since numerous other treaty provisions and executive orders of this era are implemented through this broader Presidential power.

Laurence H. Tribe in his *American Constitutional Law* (2d ed. 1988) analyzes Article II, the Executive power, which includes inherent and "implied" power, in addition to authority delegated by Congress. (Tribe, *supra*, § 4-2 at 211). Though Professor Tribe discusses foreign affairs, Article II provides the President power in the area of Indian affairs which is analogous, especially during the historical period in question.[1]

There are two constitutional bases. Major policy was implemented through the President's shared article II "power, by and with the consent of the Senate, to make treaties . . . " U.S. Const. art. II, § 2. The President is also made "commander-in-chief of the army . . . of the United States" by Article II § 2. Indian affairs were administered through the Army in this historical period. Thus, President acted in a dual role, both explicitly authorized by the Constitution, to negotiate and to administer treaties.

---

[1] Until Congress barred treaty-making with Indian tribes in 1871, Act of March 3, 1871, 16 Stat. 566.

A constitutionally shared power may be delegated to the President "more broadly than it could where its (Congress' delegated) power as enumerated in Article I defines the totality of federal authority." (Tribe, p. 212, *citing United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)). Congress did explicitly so delegate broad power over Indians, e.g., 2 U.S.C. § 2, § 9; the latter of which, first enacted in the 1830s, provides:

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

2 U.S.C. § 9.

The President had power to totally extinguish the Indians' claims to the land. The President also had the lesser-included power to allow any hunting or fishing privileges and provide that such could be conditioned or limited in duration.

Any question of presidential authority here is finally resolved by the fact that Congress ratified the Treaty of 1837, including the explicit "at the pleasure of the President of the United States" limitation on the privilege.

Both Respondents repeat the claim that the Chippewa consent was not obtained. However, the Chippewa signed the 1837 Treaty (and accepted benefits) after explanation that their use of the ceded lands would be terminable – "temporary" as the President of the United States called it, when revoking. (*See* Treaty Minutes, quoted below at p. 7.) Later treaties of 1854 and 1855 provided reservations for permanent homes and the Indians consented to relocating to these reservations.

### 2. These "Privileges" Admittedly Did Not Continue on Private Lands; They are Temporary Like the Rights in *Repsis* and *Race Horse*.

A key weakness in Respondents' argument is the admission these treaty privileges have long lapsed at least as to private lands. Trying to minimize the importance of this case, the Chippewa Respondents' brief claims that acreage figures for the 1837 Treaty area overstate the *affected* lands since only a fraction of the land is open for treaty use; "public lands and those private lands that are open to public hunting and fishing by operation of state law." (Chippewa Resp. Br., p. 3 and n. 4). Respondents then provide a lowered acreage estimate of public lands, in an effort to minimize the impact of this judgment.

This reflects the Circuit rejection of the Bands' cross-appeal which had sought to extend the privilege to more (most) private lands. App. 70-71. More importantly, this shows that the treaty privilege no longer extends to *all* lands. When lands became private, the treaty right of access terminated. As to such lands, the privilege was temporary.

The conservation impact on natural resources is worsened, however, since the resources allocated include *all* resources from *all* lands and waters in the Minnesota treaty area. Indeed fish production from boundary waters, such as Mille Lacs Lake, outside the ceded area was even included in the allocation. (*Mille Lacs Band of*

*Chippewa Indians v. Minnesota*, 952 F. Supp. 1362 (D. Minn. 1997); App. 103-104.)

The Chippewa Respondents argue that the Eighth Circuit distinguished the rights at issue in *Crow Tribe v. Repsis*, 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 116 U.S. 1851 (1996), and *Ward v. Race Horse*, 163 U.S. 504 (1896), from those in the 1837 Chippewa Treaty because "the latter are *not* limited to 'unoccupied' lands and *not* dependent on the United States retaining title . . . [and thus] temporary and precarious . . . but instead were intended to be continuing rights." Chippewa Resp. Br. at p. 19.

The United States Respondent, more succinctly, argues: "The court of appeals applied Race Horse's continuing/temporary distinction." (U.S. Resp. Br., p. 12.) The United States paraphrases the conclusion "the Chippewa's treaty rights (sic) . . . were intended by the parties to be continuing rights." (U.S. Resp. Br., p. 12.) As to private lands, this is just wrong.

The circuit court rejected the Bands' cross-appeal and concluded that the privilege has terminated as to private land; there was no access right for treaty hunting, fishing or ricing to such lands. App. 70-71. This holding is unchallenged, as there was no cross-petition.

This conclusion there is no right on private land contrasts remarkably with the one decision of this Court on which both Respondents rely, *United States v. Winans*, 195 U.S. 371 (1905), cited U.S. Resp. Br. at pp. 10, 13, 14, Chippewa Resp. Br. at 20. That *Winans* case expressly held there *was* a continuing access right over private lands.

Ironically, the exception under the decision below is that a *state* law opening private lands to hunting and fishing apparently may renew the privilege as to such lands.

As to the majority of lands in Minnesota which were ceded in 1837 (nearly 85% by the Chippewa Respondent calculation), the privilege was temporary and does not extend to those lands.

The contrary conclusion that the privilege was permanent or "continuing" as to public lands disregards not only the express revocation but the conclusion and characterization of the U.S. President. In the 1850 order – President Taylor expressly referred to the privilege as "temporary" while revoking it: "The privileges granted *temporarily* to the Chippewa . . . are hereby revoked." App. 253, emphasis added. This Court recently held a Presidential proclamation to reveal the contemporaneous understanding:

> This Court has described substantially similar language as "an unambiguous, contemporaneous, statement by the Nation's Chief Executive. . . . " *Rosebud*, 430 U.S. at 602-603.

*South Dakota v. Yankton Sioux Tribe*, 66 U.S.L.W. 4092, 4099 (1998). The language of the 1850 Order is surely persuasive as a nearly contemporaneous pronouncement by the President. In *Hagen v. Utah*, 510 U.S. 399, 420 (1994), an Order of President Roosevelt was "clear evidence of the understanding at the time."

The contradictory suggestion by both Respondents that the Indians understood the privilege to be permanent is also flatly contradicted by the express rejection of

Indian negotiators' proposal to lease the land to the United States and retain long-term use. As reflected in the 1837 Treaty Journal, *e.g.*, the U.S. negotiators responded: "Your Great Father never buys land for a term of years" but "it will probably be many years . . . Before your great father will want all these lands for the use of his white children." 1837 Treaty Journal 149.

### 3. The Eighth Circuit Conflicts with the Tenth Circuit which Had Faithfully Implemented this Court's Decisions.

While claiming this decision may be reconciled with the Tenth Circuit's *Repsis* and this Court's *Race Horse* on which that Circuit relied, the United States includes a lengthy footnote questioning "the continued vitality of *Race Horse's* rationale," (U.S. Resp. Br., p. 13, n. 3) and suggest this Court's decision has been "modified by implication" or "entirely discredited." To the contrary, this Court has cited to the *Race Horse* decision over 20 times, including recently.[2]

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[2] *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 773 n. 23 (1985); *State of Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 179 (1980) (Rehnquist concurrence and dissent), *reh'g denied*, 448 U.S. 911 (1980); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 682 n. 25 (1979); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149 (1973); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412, n. 12 (1968); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962); *Tulee v. Washington*, 315 U.S. 681, 683, n. 2 (1942); *Board of County Comm'n v. United States*, 308 U.S. 343, 354 n. 5 (1939) (Black concurrence); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 70 n. 6 (1928); *LaCoste v. Department of Conservation*, 263 U.S. 545,

As the Tenth Circuit noted:

> [W]e view *Race Horse* as compelling, well-reasoned, and persuasive. Also, contrary to the Tribe's views, there is nothing to indicate that *Race Horse* has been "overruled, repudiated or disclaimed." *Race Horse* is alive and well.

*Repsis*, 73 F.3d at 994. The U.S. Respondent's argument to the contrary actually reflects the Eighth Circuit Court's refusal to apply this Court's ruling and conflicts with the Tenth Circuit.

### 4. The Eighth Circuit Court Approved Resource Allocation While Refusing to Apply This Court's Moderate Living Standard.

Both Respondents would mislead this Court into believing there is no allocation of resources here (U.S. Resp. Br. at 26: "no need existed, as in *Fishing Vessel* [*Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979)], for a judicial allocation." Chippewa Brief at 24: "There is no court order allocating 50 percent of the resources to Bands." However, the Eighth Circuit admitted an allocation has occurred:

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549 (1923); *Brewer-Elliot Oil & Gas Co. v. United States*, 260 U.S. 77, 83 (1922); *Ruddy v. Rossi*, 248 U.S. 104, 109 (1918) (Holmes dissent); *John Bund Brewing Co. v. Great N. Ry. Co.*, 246 U.S. 651 at 651 (1917); *Virginia v. West Virginia*, 246 U.S. 565, 593 (1917); *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 562 (1915); *McCabe v. Atchison, T. & S.F. Ry. Co.*, 235 U.S. 151, 159-60 (1914); *Ex Parte Webb*, 225 U.S. 663, 683, 690 (1911); *Coyle v. Smith*, 221 U.S. 559, 573 and 576 (1910); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903); *Bollin v. Nebraska*, 176 U.S. 83, 88 (1900).

> The Conservation Code and Management Plan they have drawn up *is in effect an allocation of resources between treaty and nontreaty harvesters.* It is understandable that the Counties and Landowners, neither of which was a party to the stipulation agreeing to the Code and plan, dispute *the de facto* allocation made therein.

*Mille Lacs Band of Chippewa Indians v. Minnesota,* 124 F.3d 904 (8th Cir. 1997), App. 65, emphasis added.

The district court even more also expressly acknowledged the allocations approved in the Plan:

> The Bands have further agreed that their quotas [of big game] will not exceed 50% of the harvestable surplus in any permit unit . . .
>
> . . .
>
> . . . [as to fish] the treaty harvest is subject to a 50% ceiling . . . [but the] Management Plan . . . set the Band's quotas well below 50%.[3]

952 F. Supp. at 1381-88, App. 116, 137.

Note the allocations are "phased in" and annually increase. Also, the allocations deal with resource production from the *entire* 1837 ceded area, though the Band hunting is allowed – and concentrated – only on the much smaller portion of public and some private lands.

Conservation of these natural resources may only be assured by restriction of other citizens hunting and fishing in an amount at least equal to the harvest of the Bands. Since the Bands have become relatively wealthy from casino gambling, the "moderate living" doctrine should be considered before such draconian results.

---

[3] This appears in the section of the opinion approving Bands killing deer by "shining" over bait at night.

The result, as the circuit court admitted is at least "de facto" allocation (approved by court order), which may be converted to *de jure* under continuing jurisdiction whenever the State resists Bands' demands.

## 5. This Case is An Attack on the President's Authority.

The U.S. Respondents object that "The Counties' argument is predicated on a mischaracterization of this case as involving a judicial challenge against a President" and "The Counties cite no authority holding that federal courts . . . cannot adjudicate the scope or validity of Executive orders. . . . " (U.S. Resp. Br., p. 21.)

*Dalton v. Specter*, 511 U.S. 462 (1994), is the most recent such case (cited in Counties' Petition, pp. 13-15). Like this case, *Dalton* was ostensibly against other defendants but ultimately sought to invalidate a *Presidential* decision:

> In this rather curious fashion, the case was transmuted into one concerning the reviewability of Presidential decisions.

511 U.S. at 471.

The court below necessarily curiously "transmuted" this case into one considering the reviewability of the Presidential Order of 1850, ultimately holding President Taylor's Order "unlawful." In *Dalton*, this Court succinctly answered:

> But longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President.

*Dalton*, 511 U.S. at 474.

* * *

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Supreme Court,
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No. 97-1357

In the

# Supreme Court of the United States

October Term, 1997

JOHN W. THOMPSON; JENNY THOMPSON; JOSEPH N. KARPEN; LEROY BURLING; GLENN THOMPSON; GARY M. KIEDROWSKI; MICHAEL SHEFF; AND ROBERT L. EDMONDS,

*Petitioners,*

v.

UNITED STATES OF AMERICA; MILLE LACS BAND OF CHIPPEWA INDIANS; ARTHUR GAHBOW; WALTER SUTTON; CARLEEN BENJAMIN; JOSEPH DUNKLEY; ST. CROIX CHIPPEWA INDIANS OF WISCONSIN; LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWAS; BAD RIVER BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN; SOKAOGAN CHIPPEWA COMMUNITY, MOLE LAKE BAND, WISCONSIN; RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA; FOND DU LAC BAND OF CHIPPEWA INDIANS; ROBERT PEACOCK; PETER DEFOE; CLIFTON RABIDEAUX; HERMAN WISE; GEORGE DUPUIS,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## REPLY TO BRIEFS IN OPPOSITION

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# I. INTRODUCTION

Landowners intervened as representatives of individuals who own lands and businesses in the twelve county Minnesota portion of the 1837 ceded territory. These Landowners, like many persons who live and reside in this area, are either dependent upon or impacted by a multi-million dollar hunting and fishing tourism industry.[1] These Landowners have been supported by a widespread, voluntary grassroots fundraising effort to preserve and protect the quality of Minnesota's natural resources so that they can be equally shared by all residents of Minnesota.

While the Bands, in their Opposition to the Petitions, have tried to downplay the impact from this case, thousands of Minnesotans will suffer losses from treaty harvest.[2] The Bands claim that the issues have been settled with finality in Wisconsin for years, after this Court denied review of the Seventh Circuit's decision in Lac Courte Oreilles Band v. Voight, 700 F.2d 341 (7th Cir.1983) cert. den. 464 U.S. 805 (1983)("LCO"). The Bands neglected to tell this Court the full story. After this Court denied certiorari in LCO, Wisconsin was the scene of widespread protests, violence[3], arrests and economic downturn.[4] Put simply, this was no quiet matter in Wisconsin, and all stakeholders will benefit if the Court grants certiorari.

---

[1] Annual tourism spending in the twelve counties directly related to hunting and fishing is $34,620,000.00 with 1,727 employees (LA.10948). References herein to "LA" refer to Landowners' Eighth Circuit Appendix.

[2] Landowners' Economist opined that treaty harvest would cause an annual loss of sales to the tourist industry of $17,300,000.00, and 863 full time jobs. In addition, there would be a $41,200,000.00 loss in property values (LA.10948). Due to the sovereign immunity of the Bands, and the lower courts' dismissal of Landowners' counterclaims against the United States, this economic harm is **irreparable**.

[3] Landowners are neither suggesting nor expecting that violence will result in Minnesota. Landowners, and the local organizations that support them, have not only counseled against the irresponsible and violent conduct that shook Wisconsin in the 1980's, but have intervened in this suit as a constructive way to participate in the resolution of these issues.

## II. REASONS FOR GRANTING THE PETITION.

The decisions by the lower courts represent a singular challenge to the authority and direction of this Court in matters of Indian law. The attempt to distinguish this case based on "unique historical facts" is a flaw common to the Respondents' briefs and the lower courts' decisions. When the lower courts could not decide issues presented, issues that would determine the case adverse to the Indian bands, or which would conflict with the analysis of the lower courts on another issue, the lower courts simply declined to address the issues. The failure by the Eighth Circuit to address issues[5] raised by Petitioners does not mean that those issues were not decided; clearly they were decided adversely to the Petitioners.

The Respondents want this Court to get lost in the details of a factual argument designed to draw attention away from the fact that the Eighth Circuit failed to follow clear precedents from this Court. By looking at the factual minutiae,[6] the larger issues and the controlling precedents of this Court have been missed. This privilege was revoked in 1850 by a Presidential Order (App. 565) under authority explicitly granted from Congress. To eliminate any doubt, the 1855 Treaty ceded all interests in and to land of any kind or nature whatsoever. In the 1889 Nelson Act, 25 Stat. 642, negotiations, the Mille Lacs Band asked about, and was told, that off reservation hunting and fishing was subject to the laws of the Legislature of Minnesota, U.S. v. Minnesota, 466 F.Supp. at 1387. These decisions were reaffirmed numerous times by federal officials.[7] President Roosevelt in 1938 reaffirmed the validity of President Taylor's 1850 revocation order (App. 576).[8] Numerous presidents supported the land survey and sale process, and granted patents to citizens, all inconsistent with the continued existence of the privilege. Minnesota statehood in 1858, under the equal footing doctrine, eliminated the privilege. The Bands were paid for the full fee value of the lands and waters under the Indian Claims Commission Act's (ICCA's) proceedings. The ICCA's statute of limitations for all claims existing in 1946, which bars this action to set aside a presidential order, is circumvented if the finality and preclusive effect of the Commission's awards are not enforced (App. 555).

---

[4] At a treaty harvest averaging 7.5% of the angler harvest in Wisconsin, the Wisconsin tourism industry has suffered continuous annual losses in excess of $10,434,000.00 and 331 jobs. In addition, there has been a loss of property values in excess of $24,800,000.00 (LA.222).

[5] Examples of issues the court did not address are: 1) President Roosevelt's 1938 confirmation of the 1850 Order; 2) the language of the 1855 Treaty's enabling legislation; 3) Congress' ratification of the 1850 Order through appropriation legislation; 4) the undisputed evidence that these Chippewa understood the privilege to only extend to their home areas near their watersheds - none of which are in Minnesota for the six Wisconsin Bands.

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[6] The historical record, over 150 years old, is at best sketchy and often confusing. Petitioners believe this record, if examined carefully, supports the Petitioners' claims. History should not be rewritten to "remedy a perceived injustice." United States v. Minnesota, 466 F.Supp. 1382 (D.Minn. 1979), aff'd sub nom., Red Lake Band v. Minnesota, 614 F.2d 1161 (8th Cir. 1980), cert. den., 449 U.S. 905 (1980); U.S. v. Choctaw & Chickasaw Nations, 179 U.S. 494,533 (1900). The exclusive forum for historical injustice was created by the Indian Claims Commission Act, 60 Stat. 1049 (1946), Sections 2 and 12 (App. 550-52,555).

[7] In 1920 the Commissioner of Indian Affairs specifically informed the Fond du Lac Band that they must follow state law off reservation (LA.7742). In 1939, when specifically responding to a congressional inquiry regarding the 1837 Treaty privilege, the COIA said that, "outside their reservations . . . they are subject to state laws." (LA.8012; same: LA.7972,7754,7963,8012).

[8] In 1932, 1938 and 1945, the federal government confirmed that the 1850 Executive Order revoked any ability of the bands to hunt or fish on ceded territory to a greater extent than non-band members (LA.7434,7437-7439).

## III. THE ISSUE IN THIS CASE IS PRIVILEGE REVOCATION, NOT REMOVAL.

Unable to squarely address the nature of the 1837 privilege, both the Eighth Circuit and the Respondents attempt to convert this case into the issue of whether Indian removal could have been, or was, accomplished[9]. Diverting attention from the controlling issue, however, hardly bolsters the strength of Respondents' position.

The 1837 Treaty says **nothing** about limiting the President's power to revoke the privilege based upon removal.[10] Nor is the President's power in the 1837 Treaty limited by Indian understanding.[11] Congress in the 1837 Treaty delegated the power to decide the duration of the privilege to the President, not the federal courts.[12] Supreme Court review is warranted when lower courts reject the unanimous decisions of every President who considered the issue. Congress, through the 1837 Treaty, unambiguously limited the privilege: "during the pleasure of the President." President Taylor, in revoking, referred to the privilege as "temporary" (App.565); Hagen v. Utah, 510 U.S. 399,411 (1994). The proper analysis of presidential power under Dalton v. Specter, 511 U.S.462 (1994) leads to one conclusion: the federal courts should not override presidential orders unless unconstitutional.

---

[9] Removal is a red herring because Indian policy changed between the 1850 Order and the 1854 and 1855 Treaties from a removal policy to the reservation policy. Unquestionably, the Chippewa were "removed" to reservations designed to end "the chase" in 1854 and 1855. Several bands, Fond du Lac, Leech Lake and Gull Lake, who were subject to privilege revocation, did not reside in the 1837 ceded territory, and were not subject to removal. This proves the revocation order was not dependent on removal and revocation was severable. Champlin Mfg. Co. v. Commission, 286 U.S. 210,234 (1932).

[10] This distinguishes LCO. In LCO the Court found that the 1842 treaty (7 Stat. 591) negotiations discussed behavior as a requirement for removal and hunting right revocation. Accordingly, LCO erred by applying this 1842 standard to both the 1842 ceded territory (far northern Wisconsin and Michigan Peninsula) and the 1837 ceded territory (central Wisconsin into central Minnesota). There is no need to compound this error by repetition. The 1983 LCO decision was based upon a scant summary judgment record, relying heavily on the memoirs of Benjamin

> [W]here a statute . . . commits decision making to the discretion of the President, judicial review of the President's decision is not available.

Dalton, 511 U.S. at 477. This is particularly true in Indian affairs where Congress exercises plenary power.

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Armstrong, which were described as "low quality" (LCO 700 F.2d at 356), evidence rejected by even the Band's experts in this case (LA. 3589), and it "may not be . . . very reliable." App. 263, Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F.Supp. 784,807 (D.Minn. 1994).

[11] The Northwest Ordinance, and any duty of good faith flowing from it, have been held to be inapplicable to the exercise of the President's discretion to revoke hunting and fishing rights. Menominee Indian Tribe v. Thompson, 922 F.Supp. 184,206 (W.D.Wis. 1996); Compare, Choctaw & Chickasaw Nations, 179 U.S. at 533-34.

[12] Choctaw & Chickasaw Nations, 179 U.S. 532-36.

## IV. PETITIONERS' CLAIMS ARE NOT CONSTRAINED BY A "CONSERVATION NECESSITY" STANDARD.

Respondents take the clever tact of attempting to pigeonhole their response to the Landowners' claims[13] as unworthy of further court attention, erroneously argued as subsumed under the "conservation necessity" standard. The Bands' argument exposes its source: the dissent in Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985).[14]

No flaw is greater than the attempt to recast this hunting and fishing privilege from "an interest in and to land," to an "immunity" from state regulation contrary to this court's decisions in Klamath; Kennedy v. Becker, 241 U.S. 556 (1916) and North American Comm. Co. v. U.S., 171 U.S. 110,137 (1898).

The 1855 Treaty relinquished "all interests in and to land", and to avoid Klamath, the district court adopted an analysis that this treaty privilege must be something new, an immunity from law. This is the same argument advanced by the Klamath Tribe to the United States Supreme Court:

> "[T]he Red Lake court made no distinction between the right to hunt and fish free of state regulation (a

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[13] These claims involve the ICCA; characterizing the privilege as an "immunity"; and failing to distinguish a "privilege" from a "right."

[14] In Judge Marshall's Klamath dissent, he stated that, "a state must demonstrate that its regulation is reasonable and [a] necessary conservation measure. . . ." Klamath, 473 U.S. at 780 n.4 (dissent)(citing, Antione v. Washington, 420 U.S. at 207,n.11; and Tulee v. Washington, 315 U.S. 681 (1942)). The Eighth Circuit's decision is contrary to Klamath, and the Seventh Circuit's decision in LCO, 700 F.2d 341 (7th Cir. 1983), decided before Klamath, Dalton and Hagen, provides no precedential value.

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> regulatory right) and the right to enter upon private land to hunt and fish over the landowners' objection (a property right). Indeed, the entire Red Lake analysis is premised on the characterization of the property right asserted by the Indians as an interest in property . . . .. As the tribe has demonstrated, however, Indian hunting and fishing rights are a hybrid mixture of proprietary and jurisdictional interests and thus a right to hunt and fish free of state regulation is a right separate and apart from an interest in the property itself.

(Klamath Tribe's Brief id., La.8668 [emphasis added]). That argument was wrong then, and it is wrong now.

A privilege to hunt and fish can be held separate from land ownership, but that argument is a diversion. Full fee title includes all rights, easements and profits a prendre, including a privilege to hunt and fish. If the Eighth Circuit's decision stands, other courts will analyze hunting and fishing rights as an immunity, eschewing Klamath's directive that the general language of cession and conveyance cedes all remnants of Indian or recognized title, including hunting and fishing rights. In South Dakota v. Yankton Sioux Tribe, 522 U.S. ____, 118 S.Ct.789 (1998), the Court found that the tribe lacked regulatory and adjudicatory authority over lands that have been sold. Once all interests in and to land are conveyed,[15] the treaty privilege was conveyed and lost.

Properly analyzing the privilege as a revocable license, as an interest in or to land, implicates: the 1855 Treaty, the 1889 Nelson Act, and the Land Patenting defense (Petition, pp.8-9).

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[15] This court has repeatedly said that treaties were drawn with the common law and real property concepts in mind. The treaty drafters understood "the modes and forms of creating the various technical estates known to their law . . . ." Jones v. Meehan, 175 U.S. 1,11 (1899).

Three factors confirm this privilege was tenuous and precarious, and subject to Minnesota's laws upon statehood under Ward v. Racehorse, 163 U.S. 504 (1896), like the treaty right at issue in Crow Tribe of Indians v. Repsis, 73 F.3d 982 (10th Cir. 1995) cert. den. 116 S.Ct. 1851 (1996). First, a "temporary" revocable license is terminable at will. Second, subsequent conveyance terminates the license. Third, the lower courts' holding that the privilege was lost or "extinguished" on private lands is equivalent to the loss upon occupation standard in Crow Tribe.[16] The Seventh, Eighth and Tenth Circuits are in conflict.

## V. THE INDIAN CLAIMS COMMISSION ACT AND THE $9 MILLION ICC AWARD BAR THE BANDS' CLAIMS.

The purpose of the ICCA was to bring finality to all Indian claims then in existence (App.555). Respondents fail to come to grips with this key issue: they cannot sue another party to accomplish indirectly what they cannot do directly - bring suit against the United States to set aside the Presidential Order of 1850.

The Indian Claims Commission (ICC) quickly decided that the appropriate and sole remedy would be damages.[17]

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[16] The Crow Treaty contained a "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Crow, 73 F.3d at 985,86. If anything, a privilege "during the pleasure of the President" is much more precarious and less certain of "continuing" than the hunting right in Crow. See, LCO, 760 F.2d 177,182 (7th Cir. 1985); Mille Lac, App.71,338.

[17] "Indeed, election of remedies is often legislatively prescribed." Hathey v. Linn County, 924 F.2d 1512,1518 (9th Cir. 1991). Since damages have been paid, the election of remedies' doctrine bars the bands' claims for injunctive relief. See, Taylor v. Burlington N.R.R., 787 F.2d 1309,1317 (9th Cir. 1986); Winfield Ins. v. Edward LeRoux Group, Inc.,

The highest and best use valuation method based on timber was advocated by the Bands' ICC expert appraiser (LA. 3873) and he appraised the value of the lands and waters based upon "full fee title" (LA. 3875). The bands elected their remedy by participating in the ICC proceeding, and receiving full payment based upon full fee value. It was incumbent upon these Respondents to request an offset to preserve the privilege, but the bands did not despite extensive pleadings on other offsetting matters (LA. 4028-39,3777).

The Chippewa Bands knew the 1837 privilege had been denied by Presidents, the Commissioner of Indian Affairs, and Minnesota prior to the 1946 ICCA. The Bands' initial petitions specifically affirmed the loss of the temporary privilege. This claim was known, existing, and lost under Section 12 of the ICCA (App.555) as well as by payment. The Ninth Circuit and Klamath conflict with the Eighth Circuit's analysis of the impact of an ICC payment on subsequent claims under the same treaty.[18]

The Ninth Circuit's courts have consistently applied the ruling from United States v. Dann, 873 F.2d 1189,1199 (9th Cir.) (1989) cert. den. 493 U.S. 890 (1989) "that 'payment of [a] claims award establishes conclusively that a taking occurred' even though the claim was not actually litigated" Dept. of Ecology v. Yakima Reservation IRR. Dist., 850 P.2d 1306,1324 (Wa. 1993)(en banc); Havasupai Tribe v. U. S., 752 F.Supp. 1471,1478-9 (D.Ariz. 1990). In Western Shoshone Nat. Council v. Molini, 951 F.2d 200,203-204 (9th Cir. 1991) the court applied Klamath when ruling that treaty reserved hunting and fishing rights, as well as those flowing from aboriginal title, are lost by an ICC payment. Id.

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896 F.2d 483,488 (11th Cir. 1990); Lane v. Peterson, 899 F.2d 737,744 (8th Cir. 1990).

[18] The ICCA issues were not litigated in the Seventh Circuit's LCO decisions, further distinguishing that case.

If the Petition is denied, tribes will be able to pick state defendants, and commence a new round of litigation seeking specific performance giving them hunting and fishing rights over lands and waters for which they have already received full fee payment without offset.

## CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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AUG 5 1998

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SUPREME COURT, U.S.

No. 97-1337, 97-1356, and 97-1357

In the
# Supreme Court of the United States
October Term, 1997

◆

STATE OF MINNESOTA, et al.,
*Petitioners,*
v.
MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,
*Respondents.*

◆

COUNTY OF AITKIN, et al.,
*Petitioners,*
v.
MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,
*Respondents.*

◆

JOHN W. THOMPSON, et al.,
*Petitioners,*
v.
MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,
*Respondents.*

◆

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

◆

## MOTION AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

◆

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# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, LANDOWNERS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves to file the attached brief amicus curiae.[1] Consent to file this brief has been granted orally by counsel for the United States, the State of Minnesota, the landowners, the Minnesota Counties, and the Mille Lacs Band of Indians. The letters of consent received have been lodged with the Clerk of this Court. Requests for consent to file the amicus curiae brief were made to the other parties, but as of the date of filing this brief, no responses have been received.

## IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation has participated in numerous cases before the United States Supreme Court involving the protection of private property rights. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to name but a few.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Amicus seeks to augment the argument in the parties' briefs by arguing that if there are any remaining Chippewa usufructuary rights, the federal government has taken them and the only appropriate remedy for the taking is just compensation. No injunction should issue where such a remedy at law exists, specifically where the equities between the parties weigh heavily in favor of innocent private landowners. In particular, PLF is concerned that the Eighth Circuit's decision ignores the serious harm an injunction will work on innocent property owners.

For the foregoing reasons, PLF requests this Court to grant its motion to file the attached amicus curiae brief.

DATED: August, 1998.

Respectfully submitted,

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## INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae, Pacific Legal Foundation (Amicus), is set forth in the preceding motion.

◆

## OPINION BELOW

The Eighth Circuit opinion below is *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, and is set forth at 124 F.3d 904 (8th Cir. 1997).

◆

## INTRODUCTION

In this case, the Mille Lacs Band of Chippewa Indians (Band) has won an injunction from the district court and Eighth Circuit that prohibits the State of Minnesota from enforcing its hunting and fishing regulations against the Band. The court granted the injunction based on an 1837 Treaty which gave the Band a temporary right to hunt and fish on lands the Band had ceded to the federal government. Even though the injunction technically applies only to the State of Minnesota, it significantly interferes with the rights and reasonable expectations of third parties, especially private landowners. The lower courts did not take this impact into account. Had they done so, the lower court would have recognized that the appropriate remedy to enforce any remaining usufructuary rights is compensation for the Chippewa Indians and not injunctive relief.

For more than 150 years, the private landowners in the Mille Lacs area and their successors have put their lands to use based on their reasonable belief that the Mille Lacs Band of Chippewa Indians' claims of hunting, fishing, and gathering rights no longer existed. These rights, temporarily granted under an 1837 Treaty, were terminated in 1850 by an Executive Order of the President of the United States. *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 124 F.3d at 914. The United States government promoted this belief when it asserted over and over again that the 1837 Treaty rights had been terminated. Despite the United States government now recanting its position, its past actions created and promoted the wide-held understanding that the Indians no longer had unique hunting, fishing, and gathering rights. The government held the land open for the public to settle, transferred land it represented as having clear title, and encouraged settlers to invest their sweat and income to make the land productive and valuable.

Not until 1990 did the Band belatedly bring this action to enforce their dormant hunting and fishing rights under the 1837 Treaty. The Band argues that its treaty rights never actually terminated, and contrary to years of expressing a contrary position, the United States sided with the Band in complete disregard for the impact its position had on the private landowners. As presented more fully below, the Band, the United States, and now the lower courts have placed all the burden of resurrected treaty rights on the innocent landowners. This is inappropriate under the facts of this case.

## STATEMENT OF THE CASE

In 1837, the United States government and representatives of 12 bands of Chippewa Indians negotiated a treaty which ceded Indian ownership of certain lands in the Upper Midwest to the United States in exchange for money, goods, and supplies. *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 124 F.3d at 909-10. The treaty granted the Band the temporary privilege of hunting, fishing, and gathering[1] in the ceded territory "during the pleasure of the President of the United States." 124 F.3d at 910.

In 1850, President Zachary Taylor issued an Executive Order which revoked the temporary privileges allowed in the 1837 Treaty. 124 F.3d at 914. Nothing more was said until five years later, when the United States signed a new treaty with the Chippewa.

This 1855 treaty gave to the Chippewa certain reservation land and provided that the Chippewa

> fully and entirely relinquish and convey to the United States, any and all right, title or interest, of whatsoever nature the same may be, which they may now have in, and to, any other lands in the Territory of Minnesota.

*Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 861 F. Supp. 784, 815 (D. Minn.1994).

The 1855 Treaty was a confirmation of President Taylor's 1850 order revoking the Chippewa hunting, fishing, and gathering rights to further the United States government's policy to promote settlement of Minnesota and the West. Act of Congress, March 3, 1837; State Appellate Appendix to the Eighth Circuit Court of Appeals at 312. To further this policy, the government issued land patents conveying clear title to settlers reserving no Chippewa usufructuary rights. *See, e.g.*, patent issued to landowner's predecessor in interest, John Colson, Landowner's Trial Exhibit 13, A. Vol. 10 at 2911.

Development and use of the lands ceded under the 1837 and 1855 Treaties have gone forward ever since the President's 1850 Executive Order. *See* Landowner's Appendix to the Eighth Circuit at 10955. Much of that development relied on the fish and game resources on the ceded lands which fostered the investment and construction of many hunting lodges in the Mille Lacs area. These businesses have long been important recreational resources for the general public. In fact, annual tourism spending directly related to hunting and fishing in the ceded area is estimated at $34,620,000. Landowner's Appendix to the Eighth Circuit at 10948.

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[1] This brief will collectively refer to these rights as "usufructuary rights."

After approximately a 100-year dormancy, the issue of what remained of the Chippewa's "usufructuary" rights surfaced in a 1960 adjudication of rights before the Indian Claims Commission. A purpose of the Indian Claims Commission was to give Indians compensation if their property had been taken without just compensation. 60 Stat. 1049 § 2. The Act also gave the Commission authority to consider all equitable claims an Indian tribe or band may have against the United States. *Id.* Yet any remedy was limited to compensation. *Id.* The Chippewa filed a claim with the Indian Claims Commission which awarded the tribe $9,000,000 more than originally received for the ceded lands. The award was calculated to pay them for the highest and best use of the land. 124 F.3d at 924.

Nevertheless, 140 years after President Taylor revoked their usufructuary rights, the Band and some of its individual members filed this action against the State of Minnesota seeking to enjoin the State from enforcing its hunting and fishing regulations against Band members on lands they had ceded to the State under the 1837 Treaty. Several Minnesota counties and landowners intervened in the action to protect their rights.

The United States district court granted the requested relief and enjoined the State of Minnesota from enforcing its hunting and fishing regulations against members of the Chippewa tribe on ceded public lands and on private lands that their owners had kept open to the public. The Eighth Circuit affirmed the district court and this Court granted the State of Minnesota's Petition for Writ of Certiorari.

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## SUMMARY OF ARGUMENT

The State of Minnesota, the counties, and the landowners argue that the 1850 Executive Order, the subsequent 1855 Treaty, the Act admitting Minnesota to the Union as a State,[2] and the Indian Claims Commission award of $9,000,000 terminated the Chippewa usufructuary rights on ceded lands. Amicus, however, will not repeat the parties' arguments. Instead, Amicus will demonstrate that injunctive relief is not an appropriate remedy to vindicate Chippewa treaty rights.

Three principles of equity dictate against injunctive relief in this case. First, injunctive relief should not issue when an adequate remedy at law is available. Even if the Band's treaty rights were not completely terminated by the 1850 Executive Order, the 1855 Treaty, the Minnesota Statehood Act, and the Indian Claims Commission award, the federal government, nevertheless, has taken them. The Band has an adequate remedy in the form of compensation from the United States government for any taking of its usufructuary rights. This Court and Congress have approved of this remedy in other cases where the United States government improperly abrogated an Indian treaty right and enforcement of the improperly abrogated treaty right would adversely affect the rights of third parties.

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[2] Minnesota, like all states, was admitted to the United States "on equal footing with the original states in all respects,"and there was no reservation or exception made for the usufructuary rights temporarily allowed to the Chippewa. 124 F.3d at 926. Since those rights existed only during the pleasure of the President, they were "temporary and precarious" and terminated upon the admission of Minnesota to the Union. *Ward v. Race Horse*, 163 U.S. 504, 507 (1896).

Second, before a court issues injunctive relief, equity requires the court to consider the harm to the parties. Consideration of the harms in this case should preclude the issuance of an injunction. Stopping the State from enforcing its fishing and hunting regulations will seriously harm the economic and business interests of the innocent landowners.

Finally, laches precludes relief where a party delays bringing an action to enforce a right and the delay prejudices others. This doctrine applies here because the Band delayed bringing this action for 140 years even though it knew about Minnesota's interpretation of its rights under the 1837 Treaty and knew that Minnesota enforced state hunting and fishing laws inconsistent with Band usufructuary rights. The Band's delay has severely prejudiced landowners who have developed and invested in their property under the belief that the Band would not be asserting any residual treaty claims.

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## ARGUMENT

### I

### INJUNCTIVE RELIEF IS IMPROPER BECAUSE THE BAND HAS AN ADEQUATE REMEDY AT LAW

> It is a fundamental principle of long standing that a request for an injunction will not be granted as long as an adequate remedy at law is available.

*National Farmers Union Insurance Companies v. Crow Tribe of Indians,* 471 U.S. 845, 856 n.22 (1985). Thus, a court should not grant injunctive relief for the Band if an adequate legal remedy exists.

### A. If the Mille Lacs Band's Usufructuary Rights Survived the 1850 Executive Order and the 1855 Treaty, Then the Wrong the Band Seeks to Remedy by This Action Is the United States Government's Taking of Those Rights

The record in this case shows that the United States government issued land patents that purported to convey unreserved title in ceded Mille Lacs Band lands to many landowners. In making these conveyances, the United States did not reserve any aboriginal rights. For example, the land patent given to one of the current landowner's predecessors in title provided:

> TO HAVE AND HOLD the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging, unto the said John Colson and his heirs and assigns, forever.

Landowner's Trial Exhibit 13, A. Vol. 10 at 2911. Such land patents issued without reservation of any rights are inconsistent with the continuation of any Mille Lacs Band usufructuary rights. When the United States government issued these land patents, it transferred the fee simple estate, which is the highest estate in land. Cornelius J. Moynihan, *Introduction to the Law of Real Property*, 33-35 (1979). The fee simple estate authorized the lands' permanent, exclusive, physical occupation by their new owners which made it impossible for the Band to possess any longer, much less, enjoy its usufructuary rights. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 176

(1979) (the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property).

The United States' issuance of patents without reservation of any Band amounts to the government authorizing the physical occupation of private property (Band's usufructuary rights) which constitutes a taking:

> [A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms that rule, recent cases do not question it, and the purpose of the Takings Clause compels its retention.

*Loretto v. Teleprompter Manhattan CATV Corporation,* 458 U.S. 419, 426 (1982).

The government's action in this case is also similar to the action taken in *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952 (1991). There, by enactment of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201, *et seq.*, Congress prohibited a mining company from exercising its right to mine a particular coal deposit, because the coal was located in an alluvial valley floor Congress deemed necessary to protect. In essence, Congress appropriated the coal for its own purposes which the Court found to be a taking.

This case is no different conceptionally. By conveying unrestricted ownership of the ceded land to settlers along with the right to exclude all others, including Band members, from gaining access to the land to hunt and fish, the government appropriated the Band's usufructuary property rights for what it considered a more important purpose. It packaged these rights with all other rights embodied in fee ownership as an incentive for settlers to move into Minnesota. Such an appropriation is a taking.

### B. The Band Has a Legal Remedy for the Taking It Claims to Have Suffered: Compensation

Compensation, not injunctive relief, is the remedy for a taking. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987).[3] This remedy has been successfully sought a number of times by tribes. *See Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351 (1926); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); and *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States*, 299 U.S. 476 (1937). Compensation is the appropriate remedy here as well.

The mechanism for seeking compensation is readily available. The Band can seek compensation and money damages from the United States in federal claims court under 28 U.S.C. § 1505,[4] which provides:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any *tribe, band*, or *other identifiable group of American Indians* residing within the

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[3] The record shows that a monetary value can be placed on the 1837 Treaty right to hunt, fish, and gather on ceded Chippewa land. Landowner's Appendix to the Eighth Circuit at 10955. Thus, there is no difficulty in arriving at a dollar figure to compensate the Band.

[4] Individual Native Americans deprived of treaty rights can sue in federal district court or the claims court under the Tucker Act. *See* 28 U.S.C. § 1346(a)(2) (federal district jurisdiction for claims under $10,000).

> territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

(Emphasis added.)

*See, e.g., Hurley v. Kincaid*, 285 U.S. 95, 104 (1932) (holding that if government action "does constitute … a taking, the complainant can recover just compensation under the Tucker Act in an action at law" (citation omitted)).

### C. Compensation Is Not Only an Available Legal Remedy, It Is the Proper Remedy

This case, of course, does not represent the first time a branch of the United States government has been called upon to balance Indian treaty rights against landowner rights. On most occasions where the rights are in conflict, both the judiciary and legislative branches have endorsed a compensation remedy.

#### 1. This Court Has Approved a Compensation Remedy Rather Than Injunctive Relief to Enforce an Indian Treaty Right

A tribe's right to take fish and game is a compensable property right under the Fifth Amendment. *Grand Traverse Band of Chippewa and Ottawa Indians v. Director, Michigan Department of Natural Resources*, 971 F. Supp. 282, 288 (W.D. Mich. 1995). To protect this property right, this Court has approved just compensation as a remedy where United States government conduct has frustrated Indian treaty rights. For example, in *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, the Sioux Tribe sought monetary damages for the government's taking of a rock quarry and transferring it to private parties. This Court upheld the lower court's award of monetary relief to the Sioux Tribe. *Id.* at 359. With regard to its decision on the remedy, the *Yankton* Court expressed its concerns for the plight of innocent landowners:

> It is impossible, however, to rescind the cession and restore the Indians to their former rights, because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers.

*Id.* at 357. The Court concluded that, since the Tribes were entitled to a judgment in their favor but a return of the lands to the Tribes was impossible, the Tribes were "entitled to just compensation as for a taking under the power of eminent domain." *Id.* at 359.

As in *Yankton,* courts regularly tailor remedies to the problems at hand. Monetary relief representing fair value is "just compensation" and constitutionally is the equivalent of tangible or real property. *See, e.g., United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979); *Olson v. United States*, 292 U.S. 246, 255 (1934); *United States v. 131.68 Acres of Land*, 695 F.2d 872 (5th Cir.), *cert. denied*, 464 U.S. 817 (1983) ("the government must, and need do no more than, put the owner in 'as good a position pecuniarily as if his property had not been taken.'" *Id.* at 875 (quoting *Olson v. United States*, 292 U.S. at 255)).

In another case, *United States v. State of Minnesota*, 270 U.S. 181 (1926), the United States sought cancellation of land patents given to the State of Minnesota. The lands subject to the patents should have been reserved for the Chippewa.

This Court ruled in favor of the government and the Chippewa. It ordered the patents canceled "unless the state has sold the lands, and in that event [the United States] is entitled to recover their value." 270 U.S. at 206. While this Court did not specifically address why lands sold to others were not canceled, prejudice to third parties and the availability of an alternative compensation remedy undoubtedly provided the basis.

Such judicial tailoring of an appropriate compensation remedy also took place in *United States v. Sioux Nation of Indians*, 448 U.S. 371, where the Supreme Court addressed tribal claims that the Tribe was entitled to the return of land sold by treaty. Under the Fort Laramie Treaty of 1868, the United States had originally promised that the Sioux reservation, including the Black Hills (and basically all of South Dakota west of the Missouri River), would be set aside for the absolute and undisturbed use and occupation of the Sioux. *Id* at 375-76. The treaty also provided that no cession of land would occur without three-fourths approval of the adult male Sioux. *Id.* at 376. After the discovery of gold in the Black Hills, the United States wanted to trade the Sioux the Black Hills for subsistence rations. Although only 10% of the adult male Sioux approved the new treaty, Congress enacted the agreement anyway, thereby abrogating the Fort Laramie Treaty. *Id.* at 381-83. The Court held that, because the government had acquired the land dishonestly and unfairly, the amount paid for the Black Hills had to be construed as an abrogation of the original treaty. The action of Congress in abrogating the treaty

> effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation,

> and that obligation, including an award of interest, must now, at last, be paid.

*United States v. Sioux Nation*, 448 U.S. at 424.

Once the abrogation was established, the United States was required to pay the Indians just compensation for the taking of the Black Hills. *Id.* at 423-24. The Indians could not reclaim the Black Hills—even though the United States acted in bad faith—because the land had already been settled and was put to other uses. Under these circumstances it was impossible, unreasonable, and impractical to award the Black Hills back to the Sioux. *Id.* at 377-78. *See also Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (United States government ordered to pay Shoshone compensation for illegally moving Arapaho onto Shoshone lands).[5]

In the case at bar, many of the affected landowners innocently acquired their property which had, as a critical component of its value, the availability of fish and game. Some invested in lodges and resorts where guests came to hunt and fish, reasonably expecting that the State of Minnesota would regulate the taking of fish and game to ensure an adequate supply for future generations. Other property owners opened their land for public hunting with the same expectations and in reliance upon the United States government's representation over 150 years that no Chippewa usufructuary rights remained.

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[5] Lower courts have declined to issue injunctions where innocent landowners are injured. For example, *United States v. Imperial Irrigation District*, 799 F. Supp. 1052, 1069 (S.D. Cal. 1992) (district court refused to enforce an injunction against private property owners because "[a]n injunction would render useless thousands of acres of cultivated farmland to the detriment of innocent farmers who are blameless in this lawsuit and who have worked hard to cultivate desert lands"; monetary relief awarded).

Should this Court decide these rights were never acquired by the treaty, it has, nevertheless, become impractical and unreasonable to recognize them now as they have been taken by the government's authorization of private party occupation. Rather than disrupting the status quo by enjoining the State from enforcing its needed regulations and concomitantly injuring private landowners, this Court should instead direct the Band to refile its claim in the Court of Federal Claims where it can seek an award of monetary damages from the federal government. *See Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 12-14 (1990).

### 2. Congress Has Recognized That a Compensation Remedy Is More Appropriate to Enforce Indian Treaty Rights Than Injunctive Relief

*Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985), is very similar to the case at bar. This Court addressed the question of whether a tribe, which had ceded territory to the United States under a valid agreement, still retained a special right to hunt and fish on the lands free of state regulation. Even though the Court found that the tribe did not retain any special rights, *id.* at 763-64, it proceeded to address the appropriateness of the remedy Congress provided for a survey error that had improperly excluded certain land from the Klamath reservation. *Id.* at 756-57. This Court reasoned that the federal purchase of the improperly excluded Indian land was necessary to settle conflicts between the Indians and rapidly increasing numbers of settlers who had moved into disputed reservation lands. Rather than restore the lands excluded, due to the survey error, to the tribe—an option which would have left intact the tribe's exclusive right to hunt and fish on those lands—Congress chose to remove the excluded lands from the reservation entirely, leaving them open for all citizens' use and to compensate the tribe for a taking. *Id.* at 771-72.

Such reasoning was earlier embodied in statute when Congress adopted the Indian Claims Commission Act. Act of 1946, Chapter 959, 60 Stat. 1049 (1946). The Act created an Indian Claims Commission to "hear and determine ... claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians." Section 2. The Act provided relief for:

> (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; ... (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant.

60 Stat. 1049 § 2.

Significantly, although the Act allowed equitable claims, it provided only for monetary relief. *See* 60 Stat. 1049 § 2 (providing for the method of determination of the amount of relief). Congress had a reason to limit the relief to payment of compensation: the unfair impact on innocent landowners of making them pay for past wrongs of the United States government. As the District Court of the District of Columbia noted in applying a law which required the Secretary of the Interior to propose legislative solutions to all Indian claims that the Secretary decided not to litigate:

> Congress was acutely aware that litigation in many instances would be unfair to third parties who had purchased or inherited their property many years ago without knowledge of the Indian claims. The legislators were also troubled by the serious problem of complicity on the part of the federal government in bringing about many improper transfers and encumbrances of Indian land.

*Covelo Indian Community v. Watt*, 551 F. Supp. 366, 382 (DC Cir. 1982).

*Covelo* describes a congressional awareness of how litigation decisions could be unfair to third parties who purchased property without knowledge of Indian treaty claims. *Covelo* also noted that Congress was aware that the United States was complicit in bringing about unfair transfers from Indians. Both of those problems are present here. As demonstrated above, the injunction harms innocent third party landowners. Also, the federal government caused this harm when it transferred ceded land without any warning to the innocent settlers and purchasers that their property may still be subject to some unsettled claims.

Accordingly, this Court should direct that any remedy to enforce the Band's treaty claims must be limited to federal compensation.

## II

## BALANCING THE EQUITIES COUNSELS AGAINST AN INJUNCTION

Before an injunction can issue, the court must balance the equities between the parties. *Burford v. Sun Oil Company*, 319 U.S. 315, 345 (1943). A principle consideration of whether to grant injunctive relief is "whether the harm to the plaintiff outweighs any harm threatened by the injunction." *Savage Industries, Inc. v. Savage Arms, Inc.*, 43 F.3d 714, 719 n.8 (1st Cir. 1994).

To be sure, courts have issued injunctions after balancing the equities but, even on the few occasions courts have issued injunctive relief to enforce an Indian treaty right, they have still provided equitable protections to those who may be adversely affected. For example, in *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 686 (1979), this Court allowed Indian tribes to take only as much fish as necessary to achieve a moderate living.

More recently, the Ninth Circuit in *United States v. State of Washington*, 135 F.3d 618, 640 (9th Cir. 1998), fashioned an injunction to minimize its impact on landowners. The issue was whether specific tribes still had shellfishing rights on state tidelands. The circuit court found rights to exist but still balanced the equities by prohibiting the tribes from benefiting where the landowners had improved the shellfish beds. The *United States v. Washington* court also limited the time, place, and manner of gathering on unimproved beds. However, in this case, the Eighth Circuit employed no equitable considerations. It should have.

### A. The Landowners Are Innocent Because the United States Government Represented that the Treaty Rights Are Terminated

Amicus agrees with the state, counties, and landowners that the 1850 Presidential Executive Order and the later 1855 Treaty in which the Chippewa again ceded their lands in exchange for reservation land lawfully terminated the Mille Lacs Band's usufructuary rights. However, even if the order and subsequent treaty did not lawfully terminate those rights, they did have one effect: they created an unmistakable reasonable expectation in the landowners that their lands were free of Chippewa usufructuary rights.

When President Taylor terminated the usufructuary rights in 1850, the United States government had a policy promoting Western settlement and expansion of the nation. Act of Congress, March 3, 1837, 5 Stat. 158, State Appellate Appendix to the Eighth Circuit at 312. In order to promote settlement, all prior claims had to be extinguished so that land could be conveyed to the new settlers. *Id.*

From the 1850's until it took a contrary position in this litigation, the United States government supported this policy and consistently acted as though the Band's usufructuary rights had been terminated. For example, in 1938, President Roosevelt stated that "the hunting, fishing, and gathering privileges guaranteed by the 1837 and 1842 Treaties had been revoked by the 1850 executive order." State Appellate Appendix to the Eighth Circuit at 511.

The record below also shows on many other occasions the United States government expressly told both new settlers and the Chippewa that the hunting and fishing privileges were terminated on ceded lands, and that Chippewa hunting was subject to state law. *See* Opening Brief of Appellant Counties to the Eighth Circuit Court of Appeals at 12-14 and Opening

Brief of Landowner/Appellants John W. Thompson to the Eighth Circuit Court of Appeals at 24.

Consistent with the government's representations, the United States government issued land patents which did not show any reservations of Indian hunting or fishing rights. As the Minnesota Supreme Court has noted,

> patents were granted conveying title to private individuals … indicat[es] that our government did not construe these treaties as reserving hunting, fishing or any other rights to the Indians.

*State of Minnesota v. Keezer*, 292 N.W.2d 714, 721 n.10 (Minn. 1980). Thus, the private landowners of ceded Chippewa land are in all respects innocent of any wrongdoing.

### B. The Innocent Landowners Reasonably Relied on the Representations of the United States Government and Will Suffer Serious Injury if an Injunction Is Upheld

The landowners heavily relied on the United States' representations. Based upon the expectation that they had clear title to their property, they developed a substantial tourism industry based on hunting and fishing. Landowner's Appendix to the Eighth Circuit at 10948. They invested their lives and money in it.

The record shows that the impact of an injunction on these landowners and the tourism industry is severe. The landowners' economist testified about the extent of the impact on this industry if the Chippewa are given unrestricted hunting rights. He testified that allowing a treaty harvest would cause an annual loss in sales to the tourist industry of $17,310,000 and 863 full-time jobs. Landowner's Appendix to the Eighth

Circuit at 10948. The economist also testified that there would be a $41,290,000 loss in property values. *Id.*

Later, other property owners relied on the United States government's representations and commercially developed their property. For example, some of the landowners developed commercial timber operations. Much of this land is subject to the Minnesota Tree Growth Tax Law. Minnesota Statute § 270.31, *et seq.* Under Section 270.38 subd. 1, a property owner may apply to place his forest land under the Tree Growth Tax Law. The application must agree that

> "while the land is under the tree growth tax law it will be used exclusively for the growing of continuous forest crops in accordance with sustained yield practice and ***will be open to use by the public for hunting and fishing.***"

*Id.* (emphasis added).

Under the lower court's rulings, Band members may exercise their rights only on public lands and private lands open to public access. Since the forest lands under the Minnesota Tree Growth Tax Law are open to the public, Band members may hunt and fish on them free from state regulations.

When landowners applied to put their property under the Minnesota Tree Growth Tax Law, they did so with the expectation that the public's access for taking fish and game from those lands would be limited by Minnesota wildlife conservation regulations. The landowners did not expect that putting their lands under the Minnesota Tree Growth Tax Law would subject them to unlimited tribal access that could seriously conflict with commercial timber operations. Yet, under the district court's ruling, that is exactly what will happen; these landowners will be unprotected as the state may not limit the Band's access for hunting and fishing.

Why not just remove these lands from the tree growth tax law? In order to take the lands out of the Minnesota Tree Growth Tax Law, the property owners must apply to the local government or the State of Minnesota. ***If*** the application is granted, the property owner will have to pay back taxes and penalties for up to ten years of the time the property was under the Minnesota Tree Growth Tax Law. Thus, landowners with Minnesota Tree Growth Tax Law property can only protect themselves from unregulated hunting access if they pay a substantial penalty. Minnesota Statute § 270.38 subd. 5.

None of these landowners would have invested in their developments had they known that the Chippewa had a right to commercially harvest fish and game on and near their property free of state regulation. Now they are threatened with severe economic hardship because of their reliance on United States government representations and the inaction of the Chippewa. Landowner's Appendix to the Eighth Circuit at 10948. A court of equity should not issue an injunction under these circumstances.

## III

## THE BAND SHOULD BE BARRED UNDER THE EQUITABLE DOCTRINE OF LACHES FROM ENFORCING ITS USUFRUCTUARY RIGHTS

Under the doctrine of laches, a court should not grant injunctive relief if a party unreasonably delays bringing an action for an injunction and causes prejudice to another party. *Creswill v. Grand Lodge Knights of Pythias*, 225 U.S. 246, 260-61 (1912). "To prove laches, a party asserting the defense must show (1) lack of diligence by the party against whom the defense is asserted and (2) prejudice." *Southside Fair Housing Committee v. City of New York*, 928 F.2d 1336, 1354 (2d Cir. 1991); *Tri-Star Pictures, Inc. v. Leisure Time Productions*, 17 F.3d 38, 44 (2d Cir. 1994) (laches bars injunctive relief where a plaintiff unreasonably delays in commencing an action).

Here, the Band is belatedly claiming a right which it had apparently accepted as no longer existing. For example, the State of Minnesota has been enforcing its fishing and hunting regulations against Band members on ceded lands for more than 100 years. *See* Opening Brief of Landowner/Appellants John W. Thompson to the Eighth Circuit at 4 and 24. Yet the Band did not seek injunctive relief until 1990. It could have done so much earlier. In 1960, the Band made a claim to the Indian Claims Commission for monetary compensation for abrogation of its treaty rights. It received $9,000,000 for the highest and best use of its ceded lands but never raised any arguments for injunctive relief or additional compensation for the usufructuary rights it now claims still to possess. If the $9,000,000 did not compensate for these usufructuary rights, why did the Band fail to seek additional relief?

In reliance on the Band's inaction, Mille Lacs area landowners made substantial commercial and residential investments. For example, they built hunting lodges that must have a reasonable supply of fish and game to attract patrons and survive. The landowners would never have developed their properties in this manner had they known the fish and game could be depleted by the Band. The Band and its members easily could have prevented the landowners' prejudice had they used the Indian Claims Commission opportunity to seek additional compensation or had they brought a separate legal action for enforcement of their treaty rights (if any) prior to private landowners' investments. They never did. Consequently, the Band's action for injunctive relief should have been, and still should be, dismissed under the laches doctrine.[6]

◆

## CONCLUSION

The Eighth Circuit affirmed the district court's injunction against the State of Minnesota preventing it from enforcing its fish and game regulations. This injunction permits members of the Mille Lacs Band of Chippewa Indians to substantially interfere with the property rights of innocent, long-time private landowners in the Mille Lacs area. However, this Court and Congress have recognized that injunctive relief under such circumstances is inappropriate. Therefore, if this Court finds that any treaty rights still exist, it should reverse the

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[6] In *United States v. Washington*, 135 F.3d at 637, the Ninth Circuit held that laches cannot apply to defeat Indian treaty rights. The circuit court based its decision on this Court's decision in *Board of Commissioners of Jackson County v. United States*, 308 U.S. 343, 351 (1939). In *Board of Commissioners,* the United States government asserted an Indian claim against a county government that had improperly collected taxes from the tribe. This Court based its decision on the general unavailability of equitable defenses against the United States finding that, "state notions of laches and state statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise." In reaching this holding, *Board of Commissioners* relied on *United States v. Minnesota*, 270 U.S. 181. In that case, this Court considered whether an action substantively brought by the tribes rather than by the United States is subject to laches. This Court's implicit conclusion was that if the tribes bring the action, equitable defenses such as laches are available. 270 U.S. at 194-95. Here, the action is substantively brought by the tribe and, accordingly, laches should apply.

Eighth Circuit's approval of injunctive relief and instead direct the Mille Lacs Band of Chippewa Indians to seek compensation from the federal government in the Court of Federal Claims.

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Respectfully submitted,

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